STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-SIXTH 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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A REPORT TO THE TWENTY-SIXTH STATE LEGISLATURE

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

The report lists Alaska Statutes that will be amended or repealed between March 1, 2009, and March 1, 2010, according to laws enacted before the 2009 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2007, and September 30, 2008,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2007, and September 30, 2008.

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INTRODUCTION

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

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;

(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;

(4) the courts have modified or revised the common law of the state.

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

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

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

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

This report also includes a list of Alaska Statutes that, absent any action by the 2009 Legislature, will be repealed or amended before March 1, 2010, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

The review of state court decisions was prepared by Jerry Luckhaupt and Jean Mischel, Legislative Counsel. Dennis Bailey, Legislative Counsel, reviewed federal court decisions and opinions of the Attorney General. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between March 1, 2009 and March 1, 2010 according to laws enacted before the 2009 legislative session

Laws enacted in 2000

Ch. 117, SLA 2000 -- Alaska Industrial Development and Export Authority (as amended by sec. 2, ch. 74, SLA 2003, and sec. 3, ch. 67, SLA 2008)

AS 29.45.030(a)	amended effective November 30, 2009

Laws enacted in 2001

Ch. 57, SLA 2001 -- Reemployment and Medical Benefits for Retired PERS and TRS Employees (as amended by ch. 15, SLA 2003 and ch. 50, SLA 2005, and as reconciled with ch. 9, FSSLA 2005)

AS 14.20.135	repealed effective July 1, 2009
AS 14.25.040(a)	amended effective July 1, 2009
AS 14.25.043	amended effective July 1, 2009
AS 39.35.120	repealed effective July 1, 2009
AS 39.35.150(a)	amended effective July 1, 2009
AS 39.35.150(b) and (c)	repealed effective July 1, 2009

Laws enacted in 2004

Ch. 70, SLA 2004 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2010
AS 16.40.260	repealed effective January 1, 2010
AS 16.40.270	repealed effective January 1, 2010
AS 16.40.280	repealed effective January 1, 2010
AS 16.40.290	repealed effective January 1, 2010
AS 16.40.299	repealed effective January 1, 2010
AS 16.50.260	repealed effective January 1, 2010
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2010
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2010

Ch. 152, SLA 2004 -- Carbon Sequestration

AS 44.37.200	repealed effective June 30, 2009
AS 44.37.210	repealed effective June 30, 2009
AS 44.37.220	repealed effective June 30, 2009

Laws enacted in 2005

Ch. 50, SLA 2005 -- Reemployment of Retirees

AS 14.25.070(c)	repealed effective July 1, 2009

Laws enacted in 2006

Ch. 41, SLA 2006 -- Public School Performance Incentive Program

AS 14.03.126	repealed effective June 30, 2009

Ch. 52, SLA 2006 -- Medicaid Payment for Adult Dental Services

AS 47.07.067	repealed effective June 30, 2009
AS 47.07.900(1)	enacted effective July 1, 2009

Laws enacted in 2007

Ch. 14, SLA 2007 -- Motor Vehicle License Plates

AS 28.10.161(b)	repealed and reenacted effective January 1, 2010

Ch. 24, SLA 2007 -- DNA Registration System

AS 44.41.035(q)	new subsection effective July 1, 2009

Ch. 38, SLA 2007 -- Insurance

AS 21.09.200(i)	new section takes effect January 1, 2010
AS 21.09.200(k)	new section takes effect January 1, 2010

Laws enacted in 2008

Ch. 9, SLA 2008 -- School Funding

AS 14.17.420(a)	amended effective July 1, 2009
AS 14.17.470	amended effective July 1, 2009

Ch. 92, SLA 2008 -- Security of Personal Information

AS 40.21.110	amended effective July 1, 2009
AS 43.23.017(b)	enacted effective July 1, 2009
AS 44.64.030(a)(40)	enacted effective July 1, 2009
AS 45.48	enacted effective July 1, 2009
AS 45.50.471(b)(53)	enacted effective July 1, 2009

Ch. 104, SLA 2008 -- Business Licenses

AS 06.01.035(j)	enacted effective October 1, 2009
AS 08.01.102	amended effective October 1, 2009
AS 16.40.290(a)	amended effective October 1, 2009
AS 23.15.510	amended effective October 1, 2009
AS 43.05.290(h)	amended effective October 1, 2009
AS 43.70.020(d)	amended effective October 1, 2009
AS 43.70.020(e)	enacted effective October 1, 2009
AS 43.70.030(a)	amended effective October 1, 2009

Ch. 113, SLA 2008 -- Real Estate Licensees

AS 08.88.071(a)	amended effective March 1, 2010
AS 08.88.071(b)	amended effective March 1, 2010
AS 08.88.171(b)	amended effective March 1, 2010
AS 08.88.171(c)	amended effective March 1, 2010
AS 08.88.172	enacted effective March 1, 2010
AS 08.88.173(b)	amended effective March 1, 2010
AS 08.88.281	amended effective March 1, 2010

AS 08.88.291(a)	amended effective March 1, 2010
AS 08.88.291(d)	amended effective March 1, 2010
AS 08.88.391(b)	amended effective March 1, 2010
AS 08.88.450	amended effective March 1, 2010
AS 08.88.455	amended effective March 1, 2010
AS 08.88.460(a)	amended effective March 1, 2010
AS 08.88.460(b)	amended effective March 1, 2010
AS 08.88.460(c)	repealed effective March 1, 2010
AS 08.88.460(d)	amended effective March 1, 2010
AS 08.88.465(a)	repealed and reenacted effective March 1, 2010
AS 08.88.465(b)	repealed effective March 1, 2010
AS 08.88.465(c)	repealed effective March 1, 2010
AS 08.88.465(d)	repealed effective March 1, 2010
AS 08.88.465(e)	repealed effective March 1, 2010
AS 08.88.465(f)	repealed effective March 1, 2010
AS 08.88.470	repealed effective March 1, 2010
AS 08.88.472(a)	amended effective March 1, 2010
AS 08.88.472(b)	repealed effective March 1, 2010
AS 08.88.472(c)	repealed effective March 1, 2010
AS 08.88.472(d)	amended effective March 1, 2010
AS 08.88.474	repealed effective March 1, 2010
AS 08.88.475	amended effective March 1, 2010
AS 08.88.480	amended effective March 1, 2010
AS 08.88.490	amended effective March 1, 2010
AS 08.88.495	amended effective March 1, 2010
AS 08.88.990(13) and (14)	enacted effective March 1, 2010

Ch. 2, 4SSLA 2008 -- Bulk Fuel Loans, Power Cost Equalization, Resource Rebates, Motor Fuel Tax, and Heating Assistance Program

AS 42.45.110(c)	amended effective June 30, 2009
sec. 6(a)	repealed effective August 31, 2009
secs. 6(b) and (c)	repealed effective August 31, 2009

APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL AGAINST AN AGENCY ACTING IN A QUASI-JUDICIAL CAPACITY IS INAPPROPRIATE.

May appealed the denial of a limited entry permit to enter the Southeast Alaska herring purse seine fishery. Among various arguments on appeal, May argued that the Commercial Fisheries Entry Commission was collaterally estopped from refusing to grant him a permit because it had previously granted a permit to another person under similar facts. The commission admitted that it had erred in the previous case involving the other person but argued that it was not required to perpetuate that error when adjudicating May's case. The Alaska Supreme Court agreed with the commission finding that collateral estoppel is inappropriate when an agency is acting in a quasi-judicial capacity "particularly in cases where, as here, the agency is correcting its prior action in order to conform to the law."

May v. State, Commercial Fisheries Entry Commission, 175 P.3d 1211 (Alaska 2007).

Legislative review is not recommended.

INTERPRETATION OF POLLUTION EXCLUSION IN COMMERCIAL INSURANCE POLICY INCLUDES LEAKING GASOLINE.

A gasoline distributor carried commercial insurance that contained an exclusion for coverage of pollutants. When an underground storage tank leaked gasoline, the distributor's commercial product, the distributor challenged the insurance company's refusal of coverage for a pollutant. The court agreed with the insurance company, labeling leaked gasoline a pollutant that was not covered by the policy.

Whittier Properties, Inc. v. Alaska National Insurance Company, 185 P.3d 84 (Alaska 2008).

Legislative review is not recommended since the interpretation is consistent with federal law.

MONEY JUDGMENT PROPER FOR OWELTY IN PARTITION OF PROPERTY.

Keenan and Wade were tenants in common of property near Seldovia. They decided to terminate their co-ownership and could not decide on the property owelty, which is the "sum of money given after an . . . unequal partition of property." Keenan sued and the court determined the owelty and awarded Keenan a money judgment for the owelty. Wade appealed arguing that a money judgment was improper. The Alaska Supreme Court noted that in a case of owelty it had not been decided in Alaska whether it was proper to award a money judgment for the owelty or to merely impose a lien on the property for the amount of the owelty. The court found that a money judgment for owelty is not improper when it is not unreasonably burdensome on the party on whom it is imposed.

Keenan v. Wade, 182 P.3d 1099 (Alaska 2008).

Legislative review is not recommended.

NOTICE OF HAZARDOUS CONDITION IS NOT A PREREQUISITE TO LIABILITY FOR NEGLIGENCE FOR GROCERY STORES.

A customer sued Safeway after falling at the store. The general rule of negligence no longer makes a distinction between trespasser, licensee, or invitee. The court adopted instead a general rule of negligence requiring landowners to maintain property in a reasonably safe condition in view of all circumstances. In this case, Safeway urged the court to extend its notice requirement for highway maintenance lawsuits to hazardous conditions causing slip and fall injuries. The court declined to do so reasoning that a grocery store is more easily monitored for hazards than are highways.

Edenshaw v. Safeway, Inc., 186 P.3d 568 (Alaska 2008).

Legislative review is recommended for clarification and consistency in tort claims.

Art. I, sec. 9, Constitution of the State of Alaska
AS 28.35.030
AS 28.35.032

NO DOUBLE JEOPARDY VIOLATION FOR PROSECUTIONS FOR DRUNK DRIVING AND REFUSAL TO TAKE A BREATH TEST BASED UPON SAME CONDUCT.

Baker was observed by a peace officer driving erratically, speeding through a parking lot, and driving on a sidewalk, and was charged and convicted of various offenses including felony drunk driving and felony refusal to submit to a breath test. Baker argued that he could not be convicted of drunk driving and for refusal to take a breath test (implied consent) based upon the same conduct. The Alaska Court of Appeals disagreed finding that each offense required proof of different facts and convictions for both offenses were constitutional.

Baker v. State, 182 P.3d 655 (Alaska App. 2008).

Legislative review is not recommended.

Art. I, sec. 14, Constitution of the State of Alaska

ALASKA CONSTITUTIONAL PROTECTIONS FROM UNREASONABLE SEARCHES AND SEIZURES PROHIBIT POLICE REQUESTS TO SEARCH DURING ROUTINE TRAFFIC STOPS UNLESS THE REQUEST IS RELATED TO THE GROUND FOR THE STOP OR SUPPORTED BY ANY OTHER REASONABLE SUSPICION OF CRIMINALITY.

Article I, sec. 14, Constitution of the State of Alaska, provides protections against unreasonable searches and seizures which have been found to be broader than those provided by the federal constitution. Brown was stopped by an Alaska State Trooper for an insufficiently illuminated license plate and during the stop the trooper asked Brown if he could search her car and person for drugs. Brown assented to the requested search and the trooper found a crack pipe on her person. Brown argued the search was unreasonable, the trial court disagreed, and Brown appealed. The Alaska Supreme Court found that Art. I, sec. 14, prohibits "requests for searches during a routine traffic stop unless the search is related to the ground for the stop or is otherwise supported by a reasonable suspicion of criminality." Art. I, sec. 14, had not previously been applied to bar or limit these types of searches.

Brown v. State, 182 P.3d 624 (Alaska App. 2008).

Legislative review is not recommended as the decision is of constitutional dimension.

Art. I, sec. 15, Constitution of the State of Alaska
AS 12.55.045

2004 CHANGES TO RESTITUTION STATUTES MAY NOT BE APPLIED RETROACTIVELY.

Ortiz was convicted of robbery and ordered to pay restitution to his victims. Ortiz argued that the version of AS 12.55.045, the restitution statute, that was in effect at the time he committed his offense should govern the award of restitution in his case. The trial judge applied the version of AS 12.55.045 that was adopted by the legislature in 2004, after Ortiz committed his crime but before he was sentenced. The 2004 amendments made restitution mandatory and also prohibited a sentencing court from taking into account the defendant's ability to pay when making an award of restitution. Ortiz appealed, arguing that the application of the 2004 version of the statute violated the ex post facto clauses of the Alaska and United States Constitutions. The Alaska Court of Appeals agreed.

Ortiz v. State, 173 P.3d 430 (Alaska App. 2007).

Legislative review is not recommended as the decision is of constitutional dimension and the court's adoption of the majority view of other courts interpreting similar provisions appears reasonable.

Art. I, sec. 18,
Art. VIII, sec. 3,
Art. VIII, sec. 15,
Art. VIII, sec. 16,
Constitution of the State of Alaska
AS 16.43.150(e)

LIMITED ENTRY PERMIT DOES NOT CONFER A PROPERTY INTEREST.

In a class action, plaintiffs, commercial salmon fishers sought a declaratory judgment that regulations promulgated by the Alaska Board of Fisheries caused a taking or damaging of their property interests without just compensation. The board adopted various regulations from 1996 to 2002 that had the cumulative impact of reducing the amount of fish that the fishers were able to catch, thus reducing the value of their entry permits and shore fishery leases. The court held that the regulations did not effect a taking of entry permits requiring just compensation. Under the plain language of AS 16.43.150(e), an entry permit was not compensable property for purposes of the takings clauses of the Fifth Amendment, Alaska Constitution art. I, sec. 18, and Alaska Constitution art. VIII, sec. 16. The court also reasoned that a contrary conclusion would have violated Alaska Constitution art. VIII, secs. 3 and 15. The regulations also did not result in a compensable taking of the leases because the leases contained language permitting the regulations at issue. Even if

the permits or leases were property, the property interests were not taken or damaged through the regulations.

Vanek v. State, 193 P.3d 283 (Alaska 2008).

Legislative review is not recommended.

Art. III, sec. 22,
Art. XI, sec. 7,
Art. XII, sec. 11,
Constitution of the
State of Alaska
AS 15.45.010
AS 15.45.030
AS 15.45.040
AS 15.45.080

AN INITIATIVE RESTORING THE FUNCTIONS OF THE FISHERIES HABITAT DIVISION TO THE DEPARTMENT OF FISH AND GAME.

In 2003, Governor Murkowski issued Executive Order No. 107 which moved the Fisheries Habitat Division from the Department of Fish and Game to the Department of Natural Resources. The attorney general's opinion reviewed an initiative to restore the Habitat Division to the Department of Fish and Game. The attorney general noted a potential conflict between the initiative and the provisions of the Alaska Constitution pertaining to legislative disapproval of executive orders. The opinion concluded that the initiative addressed a subject that may properly be addressed by initiative because it allocates functions among departments of the executive branch. The opinion concluded that the initiative was in the proper form and recommended that the lieutenant governor certify the initiative application.

2007 Op. Att'y Gen. (November 7, 2007; File No. 663-04-0191).

Legislative review is not recommended.

Art. IX, sec. 6,
Art. XI, sec. 7,
Constitution of the
State of Alaska
AS 15.13.145
AS 15.45.010
AS 15.45.030
AS 15.45.040
AS 15.45.080

FORM OF AN INITIATIVE RELATING TO CAMPAIGN FINANCE.

The opinion of the attorney general evaluated an initiative creating an Alaska Anti-Corruption Act that prohibited the use of certain public funds in elections and prohibited public works contractors from contributing to candidates. The opinion noted particular issues related to First Amendment rights in the campaign finance context, the potential conflict between restricting the use of public funds and the Alaska Constitution's provision allowing the legislature to appropriate funds for any public purpose. The opinion also stated that the initiative did not violate the constitutional provision barring the use of an initiative to repeal an appropriation. The opinion

concluded that initiative was in the proper form and recommended that the lieutenant governor certify the initiative application.

2007 Op. Att'y Gen. (December 18, 2007; File No. 663-08-0057).

Legislative review is not recommended.

Art. XI, sec. 7, Art. VIII, secs. 1, 8, 12, and 13, Constitution of the State of Alaska
AS 15.45.010
AS 15.45.030
AS 15.45.040
AS 15.45.080

AN INITIATIVE TO PROTECT WATER QUALITY BY PROHIBITING MIXING ZONES USED BY SPAWNING FISH.

The opinion of the attorney general evaluated the revised application for an initiative establishing standards to protect water quality from adverse impacts caused by large scale metallic mineral mining. The opinion extensively analyzed whether the initiative constituted a prohibited appropriation in the form of a give-away of public assets or an allocation or designation of use of public assets. The opinion noted that management of a public asset by initiative is not prohibited. The court concluded that the initiative did not allocate public assets and that it addressed topics appropriate for an initiative. The opinion also concluded that the initiative was in the proper form and recommended that the lieutenant governor certify the initiative application.

2007 Op. Att'y Gen. (October 17, 2007; File No. 663-07-0179).

Legislative review is not recommended.

Rule Civ. Pro. 90.6

COURT STRIKES CHILD CUSTODY REPORT FOR FAILURE TO DISCLOSE RELATIONSHIP BY INVESTIGATOR.

Under Alaska Rule of Civil Procedure 90.6(a), the court may appoint an expert to investigate custody, access, and visitation issues and provide an independent opinion concerning a child's best interest. As part of a divorce proceeding, the court ordered a custody investigation and followed the investigator's recommendation to grant the father sole legal and primary physical custody of the child. Later, the father filed a motion to modify custody and move the child's residence. The father asked the custody investigator to be reappointed. During cross examination, the custody investigator testified that she had

traveled with the father's attorney after the divorce hearing but before the hearing on the motion to modify. Civil Rule 90.6(c) requires custody investigators to disclose any relationship between the investigator and "any party" that may cause the investigator's impartiality to be questioned. The court interpreted the rule to include attorneys of any party and struck the custody investigator's reports and recommendations for failure to disclose the relationship.

Littleton v. Banks, 192 P.3d 154 (Alaska 2008).

Legislative review is not recommended.

Alaska R. Cr. P. Rule 56

POST-TRIAL REVIEW OF DENIAL OF MOTION FOR SUMMARY JUDGMENT.

Can an appellate court review the denial of a motion for summary judgment on factual grounds after a trial? The Alaska Supreme Court found that it is improper for a court to review the denial of a motion for summary judgment, when that denial is based upon factual grounds, after a trial on the merits. The court found that this is "the approach followed by most other courts. . . ."

Larson v. Benediktsson, 152 P.3d 1159 (Alaska 2007).

Legislative review is not recommended.

Alaska Delinquency Rules, Rule 21

TRIAL COURT MAY ALLOW A JURY TRIAL IN A DELINQUENCY CASE EVEN WHEN THE REQUEST IS NOT TIMELY UNDER THE RULES.

Rule 21(a), Alaska Delinquency Rules, provides that a minor must file a request for a jury trial within 10 days of the minor's arraignment. In this case, the minor did not file the request on time, and the court refused to grant a jury trial. The minor appealed and the Alaska Court of Appeals decided that untimely requests for jury trials in delinquency cases should be decided in a similar manner as to untimely requests for jury trials in civil cases. Rule 39, Alaska Rule of Civil Procedure, allows a court to grant untimely requests for jury trials in civil cases in the court's discretion.

I.J. v. State, 182 P.3d 643 (Alaska App. 2008).

Legislative review is not recommended as this decision merely

reaffirms the process that probably is required by the constitution.

AS 08.68.334

A FELONY CONVICTION THAT HAS BEEN SET ASIDE MAY BE CONSIDERED IN LICENSING DECISION.

An applicant for certification as a nurse's aide had in the past pled no contest to two felony convictions for forgery, both later set aside after suspended imposition of her sentence, payment of restitution, imprisonment, and probation. The Board of Nursing denied the application on the grounds that the applicant had been convicted of a crime substantially related to the functions and duties of a nurse aide. The question presented on appeal was whether an applicant remains convicted of a crime after the conviction has been set aside. The court found that although setting aside a conviction limited the consequences of the conviction itself, it did not change the fact that the individual was previously found guilty of a crime. The court therefore upheld the denial of the application on the basis of the convictions.

State of Alaska v. Platt, 169 P.3d 595 (Alaska 2007).

Legislative review is recommended.

AS 09.10.070

LIMITATIONS PERIOD BEGINS TO RUN FOR A PRODUCT DEFECT CLAIM WHEN THE PLAINTIFF INCURS INJURY.

Jarvill contracted for the building of a boat. The boat subsequently sank while in its slip in Sitka and Jarvill sued claiming that a design defect caused the sinking. The builders claimed that a boat surveyor working for Jarvill had observed the boat during construction and was aware that the boat was not being constructed with heavy enough hull plating or with external stiffeners and that this knowledge should be imputed to Jarvill. This was significant to the builders as Jarvill's suit would not have been timely brought under this theory but was timely brought from the date of the sinking. The trial court agreed with the builders, dismissed the suit, and Jarvill appealed. The Alaska Supreme Court reversed, finding that the cause of action for a product defect arises when the plaintiff suffers injury, in this case, when the boat sank.

Jarvill v. Porky's Equipment, Inc., et al, 189 P.3d 335 (Alaska 2008).

Legislative review is not recommended.

AS 09.50.250

FAIR LABOR STANDARDS CLAIM MAY ONLY BE BROUGHT IN STATE COURT; CONSENT TO SUIT IN FEDERAL COURT MAY BE WITHDRAWN EVEN AS TO PENDING ACTIONS.

The plaintiff sued in federal district court under the Fair Labor Standards Act asserting an employment retaliation claim. The court found that under AS 09.05.250, as amended in 2005, actions against the state may be brought only in a state court. Further, the court found that the state could withdraw from a pending federal action.

Mun v. Univ. of Alaska, No. 06-35265, 2008 U.S. App. LEXIS 18471 (9th Cir. 2008) (unpublished decision).

Legislative review is not recommended.

AS 09.50.250(5)

EXCEPTION TO THE STATE'S WAIVER OF IMMUNITY FROM SUIT FOR SEAMEN EMPLOYED BY THE STATE UPHELD.

A state employee was injured while employed on a state ferry. The employee challenged a recent statutory exception to the state's waiver of sovereign immunity from suit that made workers' compensation coverage the exclusive remedy for seamen employed by the state, arguing that the state constitution constituted an absolute waiver of immunity. The employee also challenged the preemption of a federal act that provided relief for seamen. The court upheld the state's exception to its waiver of immunity, and the exclusive remedy provided, after analyzing and rejecting both the constitutional and the preemption arguments.

Glover v. State, 175 P.3d 1240 (Alaska 2008).

Legislative review is not recommended.

AS 09.60.010

RULE 82 IS A RULE OF PROCEDURE THAT CAN ONLY BE AMENDED BY THE LEGISLATURE AS PROVIDED IN THE CONSTITUTION WHILE A STATUTE THAT MODIFIES A POLICY-BASED NONTEXTUAL EXCEPTION TO THAT COURT RULE IS AN APPROPRIATE SUBJECT FOR LEGISLATIVE ACTION.

The Alaska Legislature enacted AS 09.60.010(b) - (e) in 2003. These subsections modified the public interest exception to the award of attorney's fees under Alaska Civil Rule 82. Two superior courts found that AS 09.60.010 was invalid as it was not passed with the two-thirds vote required by the constitution to amend a civil court rule. On appeal, the Alaska Supreme Court found that Rule 82 is a procedural rule adopted by the Court pursuant to its powers under Article IV of the Constitution of the State of Alaska and can only be amended by the legislature as provided in the constitution. The court though found that AS 09.60.010 was valid because it did not change Rule 82 or a judicial interpretation of that rule but merely modified a policy-based nontextual exception to the court rule -- the public interest exception to the award of attorney's fees -- and that this exception was an appropriate subject for legislative action. The Court also found that because the statute does not amend Rule 82 that courts are free to continue to apply all of the factors dealing with the calculation and award of attorney's fees provided in Rule 82.

State v. Native Village of Nunapitchuk, 156 P.3d 389 (Alaska 2007).

Legislative review is not recommended as the decision appears to be consistent with the purpose contained in the Act that enacted AS 09.60.010 and with the fact that the Act did not purport to amend Rule 82.

AS 09.60.080

COURT ORDERS DEDUCTION OF COSTS FROM PUNITIVE DAMAGES PAID TO THE STATE.

In a defamation case against a radio station and talk show host, punitive damages were awarded to the plaintiff. In calculating the state's share of those damages under AS 09.17.020(j), the court declined to deduct a pro rata share of the plaintiff's costs. The plaintiff argued that the punitive damages statute that required her "contingent fees" to be deducted also required

deduction of a pro rata share of all of her litigation costs. The court found the statute to be ambiguous and applied equitable principles to hold that the statute required deduction of the plaintiff's costs.

State of Alaska v. Carpenter, 171 P.3d 41 (Alaska 2007).

Legislative review is recommended to resolve the statutory ambiguity regarding costs in AS 09.60.080.

AS 09.65.330

QUALIFIED IMMUNITY FOR A PEACE OFFICER CLARIFIED WHEN USING DEADLY FORCE.

A Village Peace Officer, using a bear hug and a take down, caused the death of a person who was drunk and refusing to obey an order. The city and the officer were sued for excessive use of force. The court reviewed its past decisions and those of federal courts to clarify the qualified immunity standard. The revised standard requires courts to look at whether an officer's actions were objectively reasonable and also whether the officer's subjective expectations were reasonable so that the officer would have been on notice that a type of force was unlawful. The court found that the VPO had reasonably believed that his actions were lawful (not excessive), and therefore that the VPO did not have fair notice that they were unlawful and dismissed the claim on summary judgment.

Sheldon v. City of Ambler,178 P.3d 459 (Alaska 2008).

Legislative review is recommended to evaluate the balance struck by the court in applying a federal standard.

AS 10.06.960(k)

"NATIVE VILLAGE CORPORATION" IN ALASKA CORPORATION STATUTE HAS SAME MEANING AS IN ANCSA.

The plaintiff sought land under the Alaska Native Claims Settlement Act (ANCSA). ANCSA requires an entity claiming land to be incorporated under Alaska law. The corporate plaintiff was dissolved in 1993 and applied for reinstatement in 2005. However, the plaintiff did not qualify for reinstatement under AS 10.06.960(k) because it was not and had never been a Native village corporation as defined under AS 10.06.960(k) and was not a village corporation as

defined under ANCSA because it did not have twenty-five or more members. The court found that there was no indication that the Alaska legislature intended the term "Native village corporation" in AS 10.06.960(k) to have a different meaning from the definition of village corporation under ANCSA. Therefore the plaintiff lacked corporate capacity to sue.

Minchumina Natives, Inc. v. U.S. Dept. of Interior, No. 07-35811, 2008 U.S. App. LEXIS 18735 (9th Cir. 2008).

Legislative review is not recommended.

AS 11.16.130

IMPOSITION OF CRIMINAL LIABILITY FOR THE MISCONDUCT OF AN ORGANIZATION'S AGENT ON AN ORGANIZATION REQUIRES AWARENESS AND ACTIVE RATIFICATION OF THE CONDUCT AT ISSUE.

Greenpeace, Inc. was convicted of misdemeanor crimes involving operating a vessel in Alaska's waters without an approved oil spill contingency plan or a certificate of financial responsibility required by state law. The trial court and Supreme Court found the evidence insufficient to support the convictions against Greenpeace, Inc. for a non-employee agent's misconduct. The courts found no evidence that Greenpeace, Inc. acted to ratify or adopt the misconduct of its agent. Ratification, the court stated, requires "at a minimum both an awareness of the misconduct and some action to ratify or adopt the misconduct."

State of Alaska v. Greenpeace, Inc., 187 P.3d 499 (Alaska 2008).

Legislative review is not recommended since the court's decision is consistent with the legislative history of the criminal statute being interpreted.

AS 11.56.310

DEFENDANT MAY NOT BE CONVICTED OF ESCAPE WHEN THE PERSON WALKS AWAY FROM A HALFWAY HOUSE AND PERSON WAS THERE UNDER AN ORDER OF BAIL RELEASE.

Ivie was convicted of assault. While awaiting sentencing, Ivie requested that he be released to a halfway house. The court initially refused but allowed Ivie to be transferred to the

halfway house if a bed opened up there. Under Alaska law a court cannot select a particular institution for a person to be confined but the court can release a person on bail to a halfway house or similar institution. Even though it was not entirely clear that the court was releasing Ivie on bail to the halfway house, the Alaska Court of Appeals found that this ambiguity must be interpreted in Ivie's favor and found that Ivie could not be convicted of escape.

Ivie v. State, 179 P.3d 947 (Alaska App. 2008).

Legislative review is recommended to determine if the escape statutes and the definition of "official detention" applied in those statutes should be amended to reach this conduct.

AS 12.25.100

ALASKA'S KNOCK AND ANNOUNCE STATUTE REQUIRES PEACE OFFICERS TO ANNOUNCE THEIR AUTHORITY AND PURPOSE FOR ENTRY PRIOR TO BREAKING INTO A BUILDING OR VESSEL IN ORDER TO EFFECT AN ARREST.

Anchorage Police officers had a warrant for the arrest of Berumen. The officers knocked on the door of Berumen's hotel room for a period of time and then used a hotel pass key to gain entrance to the room. As the officers entered the room they announced that they were police officers. The officers found Berumen, among others, asleep in the room and also found controlled substances which led to Berumen's conviction for controlled substance offenses. Berumen argued on appeal that the officers violated AS 12.25.100 and that the evidence of controlled substances should be suppressed. The Alaska Court of Appeals found that AS 12.25.100 requires a peace officer to announce the officer's authority and reason for the entry before breaking into a building to effect an arrest. The court found that the Anchorage officers, by merely announcing their authority, did not comply with this statute. The court then found that suppression of the evidence was the proper remedy for this violation under Alaska law even though the United States Supreme Court has ruled that suppression is not required for a similar violation under federal law.

Berumen v. State, 182 P.3d 635 (Alaska App. 2008).

AS 12.25.100 derives from territorial days and is similar to statutes of the federal government and other states. Whether or not application of the exclusionary rule and suppression is

the proper remedy for its violation is probably beyond the purview of the legislature and so legislative review is not recommended.

AS 12.55.027

CREDIT FOR TIME SERVED FOR PARTICIPATION IN CERTAIN RESIDENTIAL TREATMENT PROGRAMS WHILE ON BAIL RELEASE PRIOR TO SENTENCING.

AS 12.55.027(b) provides that a court may grant credit toward a defendant's sentence of imprisonment for each day the defendant resides in a treatment facility as a condition of probation if the defendant observed the rules of the facility and complied with the treatment plan. Gates sought credit after she was discharged from the treatment program and did not complete the program. The court refused to grant the credit and Gates appealed. The Alaska Court of Appeals found that the language of the statute could support the court's ruling but the Department of Law confessed error stating that the statute does not require the defendant to complete the program for credit. The court independently reviewed the confession of error and found that the legislative history included testimony of the Department of Law before the legislature in support of AS 12.55.027(b). That testimony supported the conclusion that a defendant is entitled to credit for each day of successful participation in a treatment program regardless of whether the defendant completes the program.

Gates v. State, 178 P.3d 1173 (Alaska App. 2008).

Legislative review is recommended to determine if this decision accurately reflects the legislature's intent.

AS 12.55.120
AS 22.07.020

COURT OF APPEALS MAY ENTERTAIN SENTENCE APPEAL EVEN WHEN SENTENCE IMPOSED DOES NOT INCLUDE A TERM OF IMPRISONMENT OF AT LEAST 120 DAYS.

Allen was convicted of cruelty to animals and was sentenced to serve 30 days of imprisonment and placed on probation for 10 years with a condition that she not possess any animals. Allen appealed the imposition of the probation condition prohibiting her from possessing animals. The Municipality of Anchorage argued that the Alaska court of appeals as a statutorily created court only has jurisdiction to entertain

appeals in cases set by the legislature by statute. It argued that the court of appeals was without jurisdiction to entertain the appeal as the sentence did not include at least 120 days of imprisonment as required for appeals from misdemeanor offenses under AS 12.55.120 and AS 22.07.020. The court of appeals found that the sentence appeal statutes do not clearly exclude all other appeals of a sentence and that the legislature had not clearly expressed that appeals from other conditions of sentences were not within the jurisdiction of the court. In reaching this decision the court of appeals overruled decisions in effect when the legislature adopted AS 12.55.120 and AS 22.07.020. The court of appeals decided that AS 22.07.020(c) grants it jurisdiction to entertain appeals in all criminal cases except when a defendant challenges a term of imprisonment of 120 days or less as excessive.

Allen v. Anchorage, 168 P.3d 890 (Alaska App. 2007).

Legislative review is recommended. The ruling seems to be a broad expansion in the jurisdiction of the court of appeals -- jurisdiction that is limited by statute -- and overrules decisions which the legislature may have relied upon when it adopted AS 22.07.020 and AS 12.55.120.

AS 12.55.120
AS 12.55.127

DEFENDANT MAY APPEAL A SENTENCE, INCLUDING A CONSECUTIVE SENTENCE, WHEN A SENTENCE GREATER THAN THE MINIMUM IS IMPOSED.

Osborne was convicted of various offenses arising out of a drunk driving incident in which several pedestrians were struck and injured. In accordance with AS 12.55.127, the trial court made Osborne's unsuspended terms of incarceration consecutive. Osborne appealed his sentence and the state argued that Osborne was not allowed to appeal his sentence due to AS 12.55.120(e), which provides that a defendant may not appeal "a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127." The Alaska Court of Appeals found that Osborne could appeal his sentence as AS 12.55.120(e) only prohibits appeals from "minimum sentences" imposed under AS 12.55.127. The court found that the minimum period of time that must be imposed as a consecutive sentence under AS 12.55.127 was one day and that any additional time imposed beyond the one day minimum could be appealed as excessive. The court found that Osborne's sentence was not a

minimum sentence, considered Osborne's appeal, and ultimately found that Osborne's sentence was proper.

Osborne v. State, 182 P.3d 1155 (Alaska 2008).

The court interpreted AS 12.55.120(e) to apply only in situations when a composite sentence does not exceed the upper limit of the presumptive range for any single count of the crimes for which the defendant was convicted plus one day. Legislative review is recommended as it is not clear that the legislature intended for AS 12.55.120, and its reference to minimum sentences, to be interpreted in this restrictive a manner.

AS 12.55.155(d)(15)

MITIGATING FACTOR FOR POSSESSION OF SMALL AMOUNTS OF CONTROLLED SUBSTANCES FOR PERSONAL USE IN THE DEFENDANT'S HOME APPLIES WHENEVER A DEFENDANT POSSESSES A SMALL AMOUNT OF CONTROLLED SUBSTANCES AND INTENDS TO USE IT FOR PERSONAL USE AT HOME.

Whiting was convicted of two controlled substances offenses and at sentencing argued that the mitigating factor contained in AS 12.55.155(d)(15) should apply to his conduct, the possession of two oxycodone pills. AS 12.55.155(d)(15) provides a mitigating factor for an offense that involves the defendant's "possession of a small amount of a controlled substance for personal use in the defendant's home." Whiting was arrested and found with the pills while driving in his car. The trial court refused to find the mitigating factor and Whiting appealed. The Alaska Court of Appeals found that AS 12.55.155(d)(15) was ambiguous as it was not clear whether "in the defendant's home" modified "the possession of a small amount of a controlled substance" or the "for personal use" clause. The court then found under the last antecedent rule of statutory construction that "in the defendant's home" modified "for personal use" and that it did not matter where the defendant actually possessed the controlled substance as long as the defendant intended to use the small amount personally at home.

Whiting v. State, 191 P.3d 1016 (Alaska App. 2008).

Legislative review is not recommended unless the legislature intended for the mitigator to apply only when the defendant

possesses the controlled substances while in the defendant's home.

AS 12.61.120
AS 12.61.125

SOME RESTRICTIONS ON WITNESS INTERVIEWS IN VICTIM'S RIGHTS ACT UNCONSTITUTIONAL.

Several criminal defense attorneys challenged restrictions on witness interviews contained in the recently enacted Victim's Rights Act based on equal protection, procedural due process, and overbreadth grounds. The court examined the statutory requirements for criminal defendants and their representatives (1) to advise a victim and, in the case of sexual assault charges, a witness, that the person is not required to be interviewed by the defense and that the victim or witness may have a prosecutor present; (2) to obtain written consent for an interview and for recording an interview, and (3) not to have contact with a witness to a sexual assault if the witness signs a written request for no contact. The court found that the state's purposes for the restrictions did not justify the impediments they imposed on criminal defendants' rights to investigation and to confront and examine witnesses. The court also found that the restrictions, as applied to non-victim witnesses, gave prosecutors unfair advantages, despite the possibility of witnesses having similar concerns about police and prosecutorial contact as with defense attorney contact. Balancing the potential tensions between defendants' due process right and victim and witness rights, in the court's view, should result in either equal applicability to prosecutors and defendants or the least amount of conflict with defendants' rights. Since the restrictions involving unsolicited advice, no contact, written consent, and undisclosed recording violated defendants' due process rights without sufficient justification or equal applicability, the court struck those from the statute. Other restrictions, including the requirement of defendants and their representatives to identify themselves before an interview and protecting victims of sexual assault were upheld.

State v. Murtagh, 169 P.3d 607 (Alaska 2007).

Legislative review is recommended to repeal or modify the invalidated portions of the Victims Rights Act.

AS 12.63
Art. I, sec. 15,
Constitution of the
State of Alaska

APPLICATION OF THE SEX OFFENDER REGISTRATION SYSTEM TO PERSONS CONVICTED OF SEX OFFENSES BEFORE THE ENACTMENT OF THE REGISTRATION SYSTEM IS UNCONSTITUTIONAL UNDER THE EX POST FACTO CLAUSE OF THE ALASKA CONSTITUTION.

Doe (a pseudonym) was convicted of a sex offense in 1985, was released from prison in 1990, and completed his probation in 1995. The Alaska Sex Offender Registration Act (ASORA) was enacted in 1994 and required sex offenders convicted to register for a period of time based upon the number or seriousness of their offenses. The Act was later amended to apply to any sex offender regardless of whether the conviction for the offense occurred before, on, or after the effective date of the amendment in 1999. Doe sued in federal court and the United States Supreme Court eventually held that (ASORA) did not violate the federal ex post facto clause. *See*, *Smith v. Doe*, 538 U.S. 84 (2003). Doe then sued in state court and in this case the Alaska Supreme Court found that ASORA was punishment for purposes of the ex post facto clause contained in Art. I, § 15, Constitution of the State of Alaska. The court noted various provisions of other states registration schemes (esp. Connecticut) that are less likely to amount to a ex post facto violation, such as restricting dissemination of information and limiting notification to only that necessary for public safety or allowing prior convicted sex offenders to petition to restrict access to their registration information or for a declaration that registration is not necessary for public safety.

Doe v. State, 189 P.3d 999 (Alaska 2008).

Legislative review is recommended. Even though the decision is of constitutional dimension, Justice Eastaugh writing for the majority stated "the result the court reaches today does not mean that no sex offender registration act could ever satisfy Alaska's ex post facto standard." The legislature could examine application of the statutory alternatives identified by the court that are less likely to amount to an ex post facto violation.

AS 13.12.804(a)(1)(A)
AS 09.25.010(a)(2)

ALASKA'S REVOCATION OF BENEFICIARY DESIGNATION BY DIVORCE STATUTE CREATES A REBUTTABLE PRESUMPTION OF THE INTENT TO REVOKE.

AS 13.12.804(a)(1)(A) has the effect of revoking one spouse's designation of the other as a beneficiary in a life insurance policy on divorce. In this case, the divorced husband told the life insurance company that he wanted to designate his former wife as beneficiary of his life insurance policy. The U.S. District Court ruled that the statement by the husband to the agent of the insurance company was a designation of beneficiary, not an agreement to designate a beneficiary which would have been prevented under AS 09.25.010(a)(2) (the Alaska Statute of Frauds). Applying the principle that the primary purpose of the probate code is to make effective the intent of a decedent, the court found that the Alaska Supreme Court would construe AS 13.12.804(a)(1)(A) to create a rebuttable presumption that the beneficiary designation had been revoked, which can be rebutted by a preponderance of the evidence showing that the decedent intended to designate the former spouse, in spite of the divorce. The court denied the insurance company's motion for summary judgment, and decided that the former spouse was the beneficiary of the policy.

State Farm Life Ins. Co. v. Davis, U.S. District Court, 07-cv-00164, 2008 U.S. Dist. LEXIS 44003 (D. Alaska, June 3, 2008).

Legislative review is not recommended.

AS 13.16.435

ATTORNEY FEES AND PERSONAL REPRESENTATIVE AWARD IN REMOVAL ACTION OF PERSONAL REPRESENTATIVE REQUIRES GOOD FAITH.

An estate's personal representative was awarded attorney's and personal representative fees in a removal action for breach of fiduciary duty. The court found that such awards, that are for 'reasonable fees', imply a good faith element. Since the personal representative had engaged in self-dealing and bad faith conduct, the court denied the fee awards.

Dieringer v. Martin, 187 P.3d 468 (Alaska 2008).

Legislative review is not recommended.

AS 15.35.070
AS 15.35.110

A JUDGE'S FAILURE TO TIMELY FILE A DECLARATION OF CANDIDACY FOR RETENTION RESULTS IN THE JUDGE'S FORFEITURE OF OFFICE.

Judges Jeffery and Nolan were scheduled to stand for retention as judges but failed to file their "declarations of candidacy for retention" by August 1, 2004 as required by AS 15.35.070 and 15.35.110. Both judges filed late retention declarations and prior to the deadline participated in Alaska Judicial Council proceedings related to retention. The Division of Elections found that the late filed declarations were insufficient. The judges sued individually and obtained injunctions that required the division to place their names on the ballot and both judges were retained by the voters. The individual cases were consolidated and the superior court found that the judges had substantially complied with the statutory requirements and were entitled to retain their offices. The Division of Elections appealed and the Alaska Supreme Court reversed. The court was sympathetic to the hardship imposed upon the judges by its decision but found that the filing deadline requirements of AS 15.35.070 and 15.35.110 are mandatory and are to be strictly enforced. The court did find that "the statutes are silent with regard to what substance a filing must have to be considered a judge's 'declaration of candidacy.'"

State v. Jeffery, 170 P.3d 226 (Alaska 2007).

The legislature has provided details of what constitutes a declaration of candidacy and the manner and date of filing that declaration for partisan candidates for office. See, AS 15.25.030 - 15.25.040. Legislative review is recommended to determine if similar detail would be appropriate for judicial retention candidates.

AS 15.45.010
AS 15.45.030
AS 15.45.040
AS 15.45.080
AS 46.03

AN INITIATIVE TO PROTECT WATER QUALITY BY PROHIBITING MIXING ZONES USED BY SPAWNING FISH.

This attorney general's opinion evaluates an initiative intended to protect water in mixing zones used by spawning fish. The opinion concluded that the initiative was permitted, in part, because it was not an appropriation, and that the initiative bill was in the proper form, therefore the attorney general

recommended that the lieutenant governor certify the initiative application.

2007 Op. Att'y Gen. (November 8, 2007; File No. 663-08-0036).

Legislative review is not recommended.

AS 16.43.250

TRANSFER OF LIMITED ENTRY FISHING PERMIT MAY BE DENIED UNDER REGULATIONS ADOPTED FOR THAT PURPOSE.

The Commercial Fisheries Entry Commission imposed certain restrictions with regard to a geoduck fishery under the Limited Entry Act. The Commission adopted a regulation requiring a permit to participate in the geoduck fishery and determining the transferability of those permits based on a point system. On appeal, the court determined that the Commission did not exceed its statutory authority in promulgating the permit regulation. After geoduck divers applied to transfer their fisheries permit, the Commission considered the amount of geoduck collected by the divers in particular years. The Commission combined two years because the second year only involved four days of diving. The court determined that the Commission acted within its statutory authority in doing so because it gave the diver credit for his past participation in the fishery consistent with the Act's purpose. The regulation presented a reasonable, straightforward means of evaluating the economic hardship that would befall individuals excluded from the fishery which was also consistent with the Act's mandate. The court concluded that the Commission created a valid point system for measuring hardship in the fishery and acted well within its broad discretion under the Act.

Wilber v. State of Alaska, 187 P.3d 460 (Alaska 2008).

Legislative review is recommended to verify that the broad legislative authority granted under the Act was intended to limit transfer of permits based on a point system established by the Commission.

AS 18.16.020 - 18.16.030

THE STATUTES REQUIRING PARENTAL CONSENT FOR AN ABORTION OR JUDICIAL BYPASS OF CONSENT ARE AN UNCONSTITUTIONAL INFRINGEMENT ON A MINOR'S PRIVACY RIGHTS.

The Parental Consent Act requires minors to secure either the consent of their parent or judicial authorization before the minor may exercise her "uniquely personal reproductive freedom" guaranteed by the Alaska Constitution's privacy clause. While the court found a compelling state interest in protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities, the court held that requiring parental consent or judicial authorization was not the least restrictive means of advancing the state's compelling interest. The Parental Consent Act effectively shifted the right to reproductive choice to parents by giving them veto power over a minor's exercise of her constitutional right. The court also expressed concern about placing an unequal burden on minors by requiring court approval even in villages where there are obvious personal and financial hurdles for doing so. The court noted that the consent act "allows parents to refuse to consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests" quoting from other court decisions on the same topic. Finding that the state's interests could be satisfied by a less restrictive alternative, parental notification, the Parental Consent Act was held to be unconstitutional.

State of Alaska v. Planned Parenthood of Alaska, 171 P.3d 577 (Alaska 2007).

Legislative review is recommended to determine whether to require parental notification for a minor's abortion.

AS 18.23.030

STATE PEER REVIEW CONFIDENTIALITY IS PREEMPTED BY THE FEDERAL PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS ACT OF 1986.

The Disability Law Center of Alaska (DLCA) filed a complaint alleging that it was entitled to review records from North Star Behavioral Health (North Star) under the authority

of the federal Protection and Advocacy for Individuals with Mental Illness Act of 1986 (PAIMI) as part of an investigation of an incident concerning a person who was in the care of North Star. North Star asserted that some of the requested records were protected by "peer review" confidentiality under AS 18.23.030. The district court concluded that the disclosure requirements of PAIMI preempt the state statute.

Disability Law Center of Alaska, Inc. v. North Star Behavior Health, 2008 U.S. Dist. LEXIS 24790 (D. Alaska 2007).

Legislative review is not recommended.

AS 18.80.280

"ACQUITTAL" OF A DISCRIMINATION CLAIM CLARIFIED FOR PURPOSES OF COURT REVIEW.

A black man filed a discrimination complaint under the Human Rights Act when he was fired from his state job after nine years for failing to complete an anger management program. Both the Human Rights Commission and the Superior Court dismissed his complaint without a hearing. In a case of first impression, the Supreme Court reviewed the plain meaning of "acquittal" of a complaint since, under AS 18.80.280, an acquittal precludes further review of the same complaint. The court disagreed with the lower court holding that acquittal was equivalent to dismissal since the dictionary defined acquittal as an action that occurred only after a hearing. The court therefore remanded the complaint for a hearing.

Parson v. State of Alaska, 189 P.3d 1032 (Alaska 2008).

Legislative review is recommended to determine whether the legislature intended to require a hearing before a human rights complaint could be barred from further review.

AS 21.09.270

BLUE CROSS IS SUBJECT TO RETALIATORY TAXES IN ALASKA.

Blue Cross is a Washington non-profit hospital and medical services corporation that does business in Alaska. Alaska has adopted a retaliatory tax scheme that substitutes the more burdensome tax laws of another state (in this case Washington) for Alaska's tax laws to deter other states from enacting

discriminatory or excessive taxes on insurers. Blue Cross believed that the Division of Insurance was charging it too much in retaliatory taxes because the Division did not give it credit for Blue Cross' payments to the Alaska Comprehensive Health Insurance Association and the Small Employers Health Reinsurance Association. The Division found that Blue Cross was not entitled to a credit for these payments because they were not a "tax, license, or fee" but were special purpose obligations and under AS 21.09.270(b) those assessments were not to be considered (Washington also made similar assessments for a similar insurance pool). Blue Cross appealed and the Alaska Supreme Court agreed with the interpretation of the Division of Insurance.

Premera Blue Cross v. State, 171 P.3d 1110 (Alaska 2007).

Legislative review is not recommended unless the legislature desires that Blue Cross payments to the Alaska Comprehensive Health Insurance Association and the Small Employers Health Reinsurance Association be allowed as credits for taxes Blue Cross would otherwise be subject to in Alaska.

AS 21.36.220

LATE PAYMENT AND ACCEPTANCE OF INSURANCE PREMIUMS DOES NOT REQUIRE COVERAGE FOR INTERVENING ACCIDENT.

A husband and wife failed to make a scheduled insurance split premium payment for a boat and, after notice by the insurance company that the policy would be cancelled, paid half the required amount. One month after the date of cancellation, the second half of the payment was paid. The insurance company provided a "conditional receipt" that expressly stated that the payment did not reinstate the policy or afford coverage for the intervening period. The husband and wife filed a claim for a boating accident that occurred after the first half of the payment was made and before the second half of the payment was made. The insurance company denied the claim, arguing the policy was cancelled and not in force when the accident occurred. The superior court held that the insurance company could not deny coverage based on a policy lapse after having accepted a year's worth of premiums. The Supreme Court reversed, finding that the policy provided that the full premium was earned in any year in which the policy was in effect for five months or more. The company, therefore, did not communicate a message that was inconsistent with a one

month gap in coverage. The court also declined to require an express policy provision authorizing a gap in coverage, as other states have done.

Amos v. Allstate Insurance Co. 184 P.3d 28 (Alaska 2008).

Legislative review is recommended.

AS 22.05.010
AS 22.07.020

ADMINISTRATIVE APPEAL OF DECISION RELATED TO SEX OFFENDER REGISTRATION MUST BE MADE TO THE ALASKA SUPREME COURT.

Holden was convicted of assault with intent to commit rape in 1977. In 2005, Holden was notified by the Department of Public Safety that the department viewed his conviction as an aggravated sex offense that would require lifetime registration as a sex offender. Holden filed an administrative appeal of this decision with the Commissioner of Public Safety. The department ruled against Holden and Holden appealed to the superior court. The superior court affirmed the department's decision and Holden appealed to the Alaska Supreme Court. The appeal was transferred to the Alaska Court of Appeals upon the State's motion and the Alaska Court of Appeals determined that they did not have jurisdiction to hear the appeal and transferred the appeal back to the Alaska Supreme Court. The court of appeals found that their jurisdiction is limited to that set by the legislature under AS 22.07.020 (for the most part this jurisdiction is limited to criminal litigation) and that AS 22.05.010 sets the jurisdiction of appeals from superior court decisions from administrative agency decisions with the Alaska Supreme Court. The court of appeals noted that at times they have assumed jurisdiction when the legal issues involved might be considered "civil" but the issues are derived from a criminal proceeding, and at other times they have not assumed jurisdiction when the issues are primarily "criminal" but the issues are derived from a civil proceeding.

Holden v. State, 191 P.3d 725 (Alaska 2008).

Legislative review is recommended if the legislature desires to adjust the jurisdiction of the Alaska Court of Appeals to include appeals from certain administrative decisions that are intimately connected with the criminal process, such as sex offender registration. Considering that the Alaska Supreme Court has recently found that sex offender registration is punishment for purposes of the ex post facto clause (see, *Doe v. State*, 189 P.3d 999 (Alaska 2008)) having the Alaska Court

of Appeals hear judicial appeals from superior court reviews of administrative decisions related to sex offender registration appears to be reasonable.

AS 23.10.060(b)

STATE COURT ADOPTS FEDERAL INTERPRETATION OF WAGE AND HOUR ACT OVERTIME PAY FACTORS.

An employee filed a class action complaint against his employer, claiming that the employer's calculation of overtime pay violated the Alaska Wage and Hour Act (AWHA) and breached its employment contract. The employee's claim was based on the employer's failure to include several pay items in the regular rate of pay when calculating the overtime rate for field mechanics. The employer argued that even though it paid overtime for hours during which field mechanics were on call, it was only liable for damages for overtime hours the mechanics recorded as actually working. Applying the factors used in federal cases relating to the federal Fair Labor Standards Act, the Supreme Court held that all of the on-call time counted as work time for the purposes of the Alaska Wage and Hour Act, and that the employer was liable for damages for all of the overtime hours paid. However, the trial court erred in granting the employee summary judgment on the contract claim. While the AWHA's overtime provisions were expressly incorporated into all employment contracts, the limitations in the statute were incorporated as well. Since the employee had no viable breach of contract overtime claim, his recovery was governed by the two-year statute of limitations for AWHA violations rather than the three-year statute of limitations for contract claims. The trial court did not err in failing to award liquidated damages because the employer acted reasonably and in good faith.

Air Logistics of Alaska, Inc. v. Throop, 181 P.3d 1084 (Alaska 2008).

Legislative review is recommended for the purpose of determining whether the legislature accepts as a policy matter the federal factors considered for determining compensable time pay.

AS 23.30.041

WORKERS' COMPENSATION INSURER DOES NOT HAVE A FIDUCIARY RELATIONSHIP WITH A WORKERS' COMPENSATION CLAIMANT FOR PURPOSES OF NEGOTIATING A SETTLEMENT OF CLAIMS.

An insurer settled with an employee after years of treatment but did not inform the employee of the possibility of permanent total disability and other statutory benefits. After board approval, the employee moved to set aside the settlement and asked for permanent total disability benefits, citing "duress" and "fraud" by the insurer. The court found that the board correctly found that the Alaska Workers' Compensation Act creates an adversarial system and because the claimant and the insurer's interests were in conflict, there is no basis for a fiduciary relationship. A regulation imposing some duties on the insurer does not impose duties of loyalty or disavowal of self interest. Although insurance contracts have been interpreted to create a fiduciary relationship, the court found that a workers' compensation claimant is a third party beneficiary and so distinguished the relationships.

Seybert v. Cominco Alaska Exploration, et. al., 182 P.3d 1079 (Alaska 2008).

Legislative review is recommended due to the confusion created by regulations and other insurance relationships.

AS 29.40.040
AS 29.26.100

AN INITIATIVE TO AMEND LAND USE CODE IN HOMER BY REGULATING ZONING WAS INVALID.

State law places the burden of overseeing and evaluating zoning rules on planning commissions in first and second class boroughs. The purpose is to allow for a comprehensive plan for systematic and organized local development. An initiative to expand the floor area of stores in three zoning districts contradicted the limits set by the city council. The court invalidated the initiative on the basis of the lack of involvement of the city's planning commission since voters have no obligation to consider the views of the commission or be informed by its expertise. The court found that the initiative process eliminates the intended role of a planning commission, potentially undermining the comprehensive plan.

Griswold v. City of Homer, 186 P.3d 558 (Alaska 2008).

Legislative review is recommended to determine whether an exception to city planning commission authority should be made, as a policy matter, for voter initiatives.

AS 39.52
AS 39.52.330
AS 39.52.420
AS 40.25.110

USE OF STATE OWNED OR PERSONALLY OWNED ELECTRONIC EQUIPMENT FOR STATE BUSINESS.

The opinion addressed the applicability of the Executive Branch Ethics Act, AS 39.52, to the personal use of a state owned cell phone, personal digital assistant such as a Blackberry, a laptop computer, or other state owned equipment as well as a personally owned electronic device used in part for state business. The opinion analyzed the issues raised under several sections of the Ethics Act including (1) the prohibition on use of state equipment for personal benefit or benefit to another; (2) the prohibition on use of state equipment to benefit personal or financial interests; (3) the prohibition on use of state equipment for partisan political purposes; and (4) the standards for determining permissible insignificant personal use. The opinion reviewed the discipline and penalties set out in AS 39.52.420 and other remedies.

The opinion concluded that, (1) as a general rule, a public officer may not use state equipment for personal benefit; (2) personal e-mails and call records are not public records and disclosure would run afoul of an individual's constitutional right to privacy; but (3) e-mail and calls that concern state business are public records subject to disclosure unless the Public Records Act permits them to be withheld. The opinion recommended that regulations establishing the meaning of permissible insignificant use should be promulgated and suggested certain regulations that may be appropriate.

2008 Op. Att'y Gen. (August 21, 2008; File No. 661-08-0388).

Legislative review is not recommended.

AS 39.52.180(a)

RESTRICTION ON POST-STATE EMPLOYMENT APPLIES TO EMPLOYMENT WITH A MUNICIPALITY.

A public officer who leaves state employment may not work for another person on a matter that the public officer personally and substantially participated in during employment

with the state for two years after leaving state service. In response to a department request, the attorney general concluded that the limitation applies to employment with a municipality following employment with the state.

2007 Op. Att'y Gen. (May 14, 2008; File No. 661-07-0027).

Legislative review is not recommended.

AS 43.70.070
AS 43.70.075

COURT UPHOLDS LIABILITY OF TOBACCO SALES LICENSEE FOR EMPLOYEE VIOLATIONS.

A licensee's permission to sell tobacco products was suspended for 65 days and a fine was imposed after two employees pled guilty to negligently selling cigarettes to minors. The licensee challenged his own liability that was imposed without a full hearing. The applicable statutes provide a hearing for the employees on the underlying crime but limit the licensee to an administrative hearing only on the issues of a conviction of the employee and on whether the employee was acting within the scope of employment. The licensee challenged the procedure on the basis of due process rights, which he argued, entitled him to a hearing on the facts that gave rise to the convictions. Since the license represented a private economic interest, when weighed against the state's interest in control of a hazardous substance, the court held that administrative sanctions may be imposed without a hearing on or finding of intentional or negligent conduct by the licensee. The process available therefore was sufficient to meet constitutional requirements of a fair hearing even when an employee's conviction is used as conclusive evidence of the prohibited conduct.

Godfrey v. State of Alaska, 175 P.3d 1198 (Alaska 2008).

Legislative review is not recommended since the tobacco control statutes adopted by the legislature withstood constitutional scrutiny.

AS 44.12.300 - 44.12.390

INITIATIVE TO REQUIRE THE USE OF ENGLISH LANGUAGE ONLY BY GOVERNMENT AGENCIES, OFFICERS, AND EMPLOYEES FOUND CONSTITUTIONAL AFTER PORTION OF THE STATUTE WAS SEVERED.

A ballot initiative to make English the official language in the state was examined for constitutional soundness under

Alaska's Constitution, art. I, sec. 5, protecting free speech. Reviewing the text of the initiative as well as the voter information, the Supreme Court declined to interpret the initiative as a whole as allowing non-English speakers to communicate with a government employee in a language other than English during "informal" interactions. The first sentence of the initiative's express scope applied to all government functions: "The English language is the language to be used by all public agencies in all government functions and actions." In contrast, the second sentence referred to "official" acts and was therefore "capable of a narrow reading that is supported by its text and by the ballot materials." Finding the interests underlying the initiative to be compelling but the means chosen to be insufficiently tailored to those interests, the court held that the first sentence unconstitutionally restricted the speech rights and the ability to participate in public life of private citizens, elected officials, and government employees.

Having determined that the first sentence of AS 44.23.320 was unconstitutional, the court concluded that it could be severed from the remaining provisions of the initiative. Applying the standard for severability established in Lynden Transport, the court found that (1) legal effect could be given to the remaining provisions of the statute; and (2) the voters intended for the remainder of the statute to stand on its own. The court also cautioned that the remaining statutory provisions must be interpreted narrowly to avoid violating an individual's rights of free speech.

Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007).

Legislative review is recommended to determine whether clarification of the redacted statute (AS 44.12.320) is needed, given the court's constitutional analysis.

AS 44.23.020

ATTORNEY GENERAL MAY REPRESENT THE STATE AND MAY WAIVE THE STATE'S ELEVENTH AMENDMENT IMMUNITY.

In this U.S. District Court case, the state was allowed to intervene in an action by four Alaska Indian tribes against the Department of Interior challenging the validity of a regulatory bar precluding acquisition of land in Alaska into trust status for most federally recognized tribes. The plaintiffs argued that

ANCSA did not repeal the 1934 and 1936 amendments to the Indian Reorganization Act. The court acknowledged Alaska's interest in the litigation and its standing to participate in the litigation. The court also recognized the statutory authority under AS 44.23.020 and the common law authority giving the attorney general discretionary authority to institute, defend, or intervene in any litigation that involves a compelling public interest, and the authority to waive Alaska's Eleventh Amendment immunity to the extent necessary to participate in the litigation.

Akiachak Native Community v. Department of Interior, 2008 U.S. Dist. LEXIS 81589, September 30, 2008.

Legislative review is not recommended.

AS 45.50.577(i)

AN INDIVIDUAL ASSERTING AN ANTITRUST CLAIM AS AN INDIRECT PURCHASER FOR MONEY DAMAGES MAY NOT BRING A CLAIM UNDER THE ALASKA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT.

Indirect purchasers of Static Random Access Memory (SRAM), who purchased SRAM for end use and not for sale, filed a class action alleging that the sellers conspired to fix and maintain artificially high prices for SRAM. The indirect purchasers alleged, in part, violation of the Alaska Unfair Trade Practices and Consumer Protection Act (AUTPCPA). The court relied on the Alaska antitrust statute to conclude that a claim seeking monetary relief for injury indirectly sustained because of a violation of the Alaska antitrust statutes does not provide a basis on which the plaintiffs could bring an action under the AUTPCPA. The court decided that the claim of the indirect purchasers under AUTPCPA was barred as a matter of law.

In re Static Random Access Memory Antitrust Litigation, No. M:07-cv-01819 CW, 2008 U.S.Dist. LEXIS 15826 (N.D. Cal. 2008).

Legislative review is recommended if the legislature wishes to clarify whether an indirect purchaser with standing in the antitrust context may bring an action under the AUTPCPA.

AS 47.10.088(b)(2)
AS 47.10.088(c)

SHORT TERM ATTEMPT TO REMEDY POOR PARENTAL BEHAVIOR AFTER YEARS OF CHILD NEGLECT MAY BE CONSIDERED IN BEST INTEREST REVIEW.

The parents of two young children were the subject of a petition to terminate parental rights, based on seven years of reports of harm to their children as a result of chronic substance abuse and violence. Six months before the termination trial the mother stopped using alcohol and made attempts to change her behavior. The court held that it was proper to consider the mother's determination to change and her capability to do so as part of the review of what was in the children's best interest, despite a finding that the parent did not remedy the conditions that put her children at risk "within a reasonable time" under one of the applicable statutes. Since another statute allowed the court to make a general determination of whether termination of parental rights was in the child's best interest, the court did not narrow the applicability of that section and allowed delayed attempts to remedy the reasons for termination.

Karrie B. v. State of Alaska, 1181 P.3d 177 (Alaska 2008).

Legislative review is recommended to consider the court's interpretation of AS 47.10.088(b) and (c) and potential conflicts between those subsections.

AS 47.17.290

CHILD ADJUDICATED IN NEED OF AID FOR MENTAL INJURY WITHOUT "GROSS PARENTAL MISCONDUCT".

A child who suffered from her mother and stepfather's constant, humiliating, and unusual discipline of herself and her siblings that created a chronic, pervasive climate of fear in the mother's home, was a child in need of aid on the basis of mental injury alone. The mother's argument that a finding of mental injury required evidence of "gross parental misconduct" was rejected by the court in favor of a "serious emotional harm" standard expressed in the current statute, legislative history, and case law. Since "emotional harm" was not defined in statute, the court relied on expert opinion and evidence of harm.

Josephine B. v. State of Alaska, 174 P.3d 217 (Alaska 2007).

Legislative review is recommended to consider the mental injury and emotional harm standards interpreted by the court.

AS 47.30.915(7)(B)

DEFINITION OF "GRAVELY DISABLED" IS CONSTITUTIONAL ONLY IF CONSTRUED TO REQUIRE A SUBSTANTIAL LEVEL OF INCAPACITY THAT AFFECTS SAFETY.

A person who was ordered to be involuntarily committed to a psychiatric hospital appealed the order. The order was based on expert opinion that the appellant was "gravely disabled" as a result of mental illness that caused the appellant to be in a manic state, homeless, and to fail to take needed medications. The Alaska Supreme Court, in a case of first impression, construed the statutory definition of "gravely disabled" to require a safety element. The statutory definition allowed for involuntary commitment of a person if the person's mental illness would result, if untreated, in a substantial deterioration of the person's previous ability to function independently, without an express reference to safety. The court construed the deterioration standard to require a level of incapacity so substantial that the ill person is incapable of surviving safely in freedom.

Wetherhorn v. Alaska Psychiatric Institute, 156 P.3d 371 (Alaska 2007).

Legislative review is recommended to modify the statutory language to be consistent with this opinion.

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