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
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2009

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

The report lists Alaska Statutes that will be amended or repealed between February 28, 2010, and March 1, 2011, according to laws enacted before the 2010 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2008, and September 30, 2009,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2008, and September 30, 2009.

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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 2010 Legislature, will be repealed or amended before March 1, 2011, 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 February 28, 2010 and March 1, 2011 according to laws enacted before the 2010 legislative session

Laws enacted in 1990

ch. 48, SLA 1990 -- Goldstream Public Use Area

AS 41.23.140	repealed effective July 1, 2010
AS 41.23.150	repealed effective July 1, 2010
AS 41.23.160	repealed effective July 1, 2010
AS 41.23.170	repealed effective July 1, 2010

Laws enacted in 2004

ch. 61, SLA 2004 -- Alaska Insurance Guaranty Association

AS 21.80.060(a)	amended effective July 1, 2010

ch. 70, SLA 2004, as amended by ch. 61 SLA 2009 --Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2011
AS 16.40.260	repealed effective January 1, 2011
AS 16.40.270	repealed effective January 1, 2011
AS 16.40.280	repealed effective January 1, 2011
AS 16.40.290	repealed effective January 1, 2011
AS 16.40.299	repealed effective January 1, 2011
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2011
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2011

Laws enacted in 2005

ch. 9, FSSLA 2005, as amended by ch. 20, SLA 2007 -- PERS, TRS

AS 14.25.061(c)	repealed effective June 30, 2010
AS 14.25.062	repealed effective June 30, 2010
AS 14.25.075(a)	amended effective June 30, 2010
AS 14.25.075(b)	amended effective June 30, 2010
AS 14.25.075(i)	amended effective June 30, 2010
AS 14.25.150(c)	enacted effective June 30, 2010
AS 39.35.165(a)	amended effective June 30, 2010
AS 39.35.165(b)	amended effective June 30, 2010
AS 39.35.165(g)	amended effective June 30, 2010
AS 39.35.165(i)	amended effective June 30, 2010
AS 39.35.200(d)	enacted effective June 30, 2010
AS 39.35.350	repealed effective June 30, 2010
AS 39.35.375(f)	amended effective June 30, 2010
AS 39.35.485(a)	amended effective June 30, 2010

Laws enacted in 2007

ch. 20, SLA 2007 -- PERS, TRS

AS 14.25.075(f)	amended effective July 1, 2010
AS 14.25.125(c)	amended effective July 1, 2010
AS 14.25.310	amended effective July 1, 2010
AS 39.35.165(f)	amended effective July 1, 2010
AS 39.35.375(a)	amended effective July 1, 2010
AS 39.35.375(f)	repealed effective July 1, 2010
AS 39.35.385(c)	amended effective July 1, 2010
AS 39.35.700	amended effective July 1, 2010

ch. 38, SLA 2007 --Insurance Audit Reports

AS 21.09.200(i)	enacted effective December 31, 2010

Laws enacted in 2008

ch. 9, SLA 2008 -- School Funding

AS 14.17.420(a)	amended effective July 1, 2010
AS 14.17.470	amended effective July 1, 2010

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)	amended 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(5)	enacted effective March 1, 2010
AS 08.88.990(6)	enacted effective March 1, 2010

Laws enacted in 2009

ch. 6, SLA 2009 -- Alaska Territorial Guard

sec. 1	repealed effective February 28, 2010

ch. 20, SLA 2009 -- Air Emissions and Air Quality Grants

AS 46.14.535	repealed effective January 1, 2011

GOVERNMENT DOES NOT NEED TO PROVE A VIOLATION OF STATE LAW TO SUSTAIN A FEDERAL HONEST SERVICES FRAUD CONVICTION.

A member of the Alaska House of Representatives allegedly voted and took other official actions on legislation at the direction of an oil field services company while engaged in undisclosed negotiations for future legal work from the company. The district court found that state law did not require Weyhrauch to disclose the conflict of interest. On appeal, the Ninth Circuit Court of Appeals held that the federal statute established a uniform standard for "honest services" that governed every public official and that the government did not need to prove a violation of state law to sustain an honest services fraud conviction. The issue is under consideration by the U.S. Supreme Court.

United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), U.S. Supreme Court, certiorari granted by, in part, Weyhrauch v. United States, 2009 LEXIS 4787 (U.S., June 29, 2009).

Legislative review is recommended.

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

COMPLAINT INVOLVING LEGISLATIVE INVESTIGATION OF GOVERNOR'S DISMISSAL OF APPOINTEE DISMISSED FOR LACK OF STANDING.

Five legislators appealed a dismissal of a suit to enjoin the legislature from completing an investigation into the dismissal of a public safety commissioner by the then governor. The plaintiff legislators urged the court to find that the investigation violated the former governor's constitutional right to fair and just treatment in the course of legislative investigations. The Supreme Court upheld the lower court's dismissal of the complaint, finding that the former governor was able to assert her own constitutional rights if she believed her rights were being violated. The court found that the plaintiffs did not have standing either under a citizen-taxpayer theory of standing or an interest-injury theory. The court stated that citizen-taxpayer standing was unavailable as there

were other persons who were more directly affected by the investigation; interest-injury standing was unavailable as no actual injury was identified by the plaintiffs. The concurring opinion further noted that the:

> core of the Keller plaintiffs' case does not really concern the protection of individual rights -- it concerns a dispute between legislators, in their official capacities, about the power and authority of the Legislative Council and how legislative investigations should be conducted. This dispute raises legitimate and important questions, but we have long made clear our aversion to court involvement in internal disputes of the legislature.
>
> We have stated that courts may intervene to protect against the legislature's infringement of personal rights, but common sense suggests that intervention must be at the instance of one whose individual rights may be violated, not at the instance of legislators who oppose their colleagues' use of legislative power. Concluding otherwise and recognizing citizen-taxpayer standing under these circumstances would allow an exception to swallow our rule of declining to decide political questions arising from internal legislative disputes.

Keller v. French, 205 P.3d 299, 305-306 (Alaska 2009).

Legislative review is not recommended.

Art. I, sec. 9, Constitution of the State of Alaska
Alaska Evidence Rule 412

PRIOR INCONSISTENT STATEMENTS OBTAINED IN VIOLATION OF *MIRANDA* ARE ADMISSIBLE UNDER EVIDENCE RULE 412 IF THE VIOLATION WAS NOT INTENTIONAL.

In 2004, the legislature, utilizing its authority under Art. IV, sec. 15, Constitution of the State of Alaska, adopted Evidence Rule 412, which allows a defendant to be impeached with statements "obtained in violation of the right to warnings under *Miranda*." In this case, the Alaska Court of Appeals clarified the meaning of the above language and its constitutionality.

First, the court found that Evidence Rule 412 applies when the police fail to administer proper *Miranda* warnings (*Miranda* refers to *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires police to provide warnings regarding a person's right to remain silent and right to counsel), and when the police fail to properly honor a person's invocation of their rights. Second,

the court found that the use of prior statements obtained in violation of *Miranda* is constitutional when the *Miranda* violation by the police is not intentional. Finally, the court concluded that if the police conduct is intentional, that is the police officer conducting the interrogation knows that further interrogation would violate *Miranda* and the officer consciously chooses to continue, then Rule 412 is unconstitutional as it diminishes the functions of *Miranda* and the exclusionary rule.

State v. Batts, 195 P.3d 144 (Alaska App. 2008).

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

Art. I, sec. 14, Constitution of the State of Alaska
AS 28.35.031(g)

EXIGENT CIRCUMSTANCES AS AN EXCEPTION TO THE WARRANT REQUIREMENT EXIST AS A MATTER OF LAW WHEN OBTAINING A BLOOD SAMPLE UNDER AS 28.35.031(G).

Dale drove his truck off a 100-foot embankment causing serious injury to his two passengers. Dale walked away from the accident scene and was found a short distance away swaying, with slurred speech, bloodshot watery eyes, and a smell of alcohol on his person. Dale was transported to the hospital with his passengers. The hospital staff obtained a blood sample from Dale at the direction of an Alaska State Trooper under the authority of AS 28.35.031(g), which provides that a person gives consent to a chemical test of the person's breath, blood, and urine if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person. Dale argued that the trooper should have obtained a warrant as required by Art. I, sec. 14 of the Constitution of Alaska, before drawing his blood. The state argued that exigent circumstances always exist when drawing blood under AS 28.35.031(g) so as to dispense with the requirement of a warrant under the constitution. The Alaska Court of Appeals agreed with the state finding that exigent circumstances always exist when a person has been operating a motor vehicle involved in an accident that has caused death or serious physical injury to another person as blood-alcohol evidence dissipates over time and therefore no warrant is required.

Dale v. State, 209 P.3d 1038 (Alaska App. 2009).

Legislative review is not recommended as the decision appears to correctly apply the statute.

Art. I, sec. 19, Constitution of the State of Alaska
AS 11.61.200

THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS DOES NOT PREVENT THE STATE FROM MAKING IT ILLEGAL FOR A CONVICTED FELON TO POSSESS A FIREARM.

Wilson was convicted of being a felon in possession of a concealable firearm in violation of AS 11.61.200(a)(1). Wilson had previously been convicted of a "non-violent, class C felony, theft in the second degree" -- for fraudulently obtaining unemployment benefits. On appeal, Wilson argued that AS 11.61.200 is unconstitutional as it does not differentiate between persons convicted of violent felonies and those convicted of nonviolent felonies, and therefore conflicts with the individual right to keep and bear arms guaranteed in Art. I, sec. 19, Constitution of the State of Alaska. The Alaska Court of Appeals relied on *District of Columbia v. Heller*, 554 U.S. __, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (interpreting the Second Amendment to the United States Constitution), and other cases to hold that Art. I, sec. 19, does not restrict the authority of the legislature to regulate the possession of firearms by felons and that the legislature may properly restrict all felons from possessing a concealable firearm if the legislature so chooses.

Wilson v. State, 207 P.3d 565 (Alaska App. 2009).

Legislative review is not recommended unless the legislature wants to review the types of felonies to which AS 11.61.200(a)(1) applies.

Art. II, sec. 21, Constitution of the State of Alaska
AS 09.50.250

THE STATE WAIVES A DEFENSE BASED ON SOVEREIGN IMMUNITY IF THE STATE FAILS TO AFFIRMATIVELY PLEAD THE DEFENSE.

The court found that the state can waive sovereign immunity through litigation conduct even when the defense applies to a case by statute. In this case, the state litigated a claim for fraudulent conveyance of millions of dollars for ten years before the state raised a defense based on sovereign immunity. Although the legislature is empowered under the constitution to establish procedures for suits against the state, the court noted that the general rule is that the government is liable for its wrongs unless made expressly immune. Among the statutorily express immunities are claims arising out of misrepresentation, deceit, or interference with contract, all of which applied to this case. The Supreme Court rejected the

argument that sovereign immunity affects the court's jurisdiction to hear a case and held instead that sovereign immunity is an affirmative defense that must be raised in pleadings to avoid waiver.

Sea Hawk Seafoods v. State, 215 P.3d 333 (Alaska 2009).

Legislative review is recommended to determine whether the holding is consistent with legislative intent when immunities are otherwise statutorily available.

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

cited

DEDICATED FUNDS CLAUSE PROHIBITS EARMARKING OF PROCEEDS FROM LAND SALES.

The legislature conveyed specified lands to the University of Alaska and authorized the University of Alaska Board of Regents to sell the lands and to deposit the proceeds from the sales into the University's endowment trust fund. Alaska Constitution Art. IX, sec. 7, prohibits the dedication of proceeds of any state tax or license. The court held that land sale proceeds were intended by the constitutional convention delegates to be included in the definition of "proceeds of any state tax or license". The court reasoned that an exclusion for mineral lease rentals and sale proceeds would not have otherwise been needed if the phrase were not intended to capture a broad range of revenue-producing activities by the state. The court distinguished a lump sum appropriation based on the present value of future sale proceeds from tobacco products, which it said did not create a dedicated fund or result in revenues being placed in a pre-existing dedicated fund. In that instance, because the legislature sold the tobacco settlement and then appropriated the resulting income, it did not directly violate the dedicated funds prohibition, though the court then scrutinized whether the practice in some way undercut the anti-dedication policies. The sale of University land, on the other hand, produces state revenue for purposes of the dedicated funds clause since the land is state land. The land grant provisions alone would not enhance the University's endowment as intended by the act, therefore, in the court's opinion, the legislature would not have conveyed the lands without dedicating the proceeds to the University. The conveyance itself could not be severed from the unconstitutional provision dedicating the proceeds.

Southeast Alaska Conservation Council v. State, 202 P.3d 1162 (Alaska 2009).

Legislative review is not recommended.

Art. IX, sec. 15, Constitution of the State of Alaska
AS 37.13.140
AS 37.13.145
AS 37.13.170

ACCOUNTING FOR PRINCIPAL AND INTEREST FROM THE PERMANENT FUND AND THE PERMANENT FUND EARNINGS RESERVE ACCOUNT.

In the opinion, the attorney general analyzed the constitutional and statutory framework, and the history of the permanent fund in order to answer questions posed with regard to accounting for the principal and interest of the fund and the permanent fund earnings reserve account. The attorney general concluded that:

> 1. Only realized earnings are to be deposited in the earnings reserve account. The earnings reserve account should, however, retain the unrealized gains and losses attributable to the investments of the earnings reserve account. The entire balance of the earnings reserve account is subject to appropriation, and thus available for expenditure.
> 2. For purposes of computing the amount "available for distribution" under AS 37.13.140, the unrealized gains and losses of the fund should be excluded. The amount available for distribution under AS 37.13.140 is different than the amount constitutionally available for appropriation - which is the entire balance of the earnings reserve account.
> 3. Nothing in law prohibits an appropriation from the earnings reserve account, even if making such an appropriation would reduce the total value of the permanent fund to less than the amounts deposited or appropriated to the principal.
> 4. Nothing in law prohibits the payment of permanent fund dividends [for 2009]. A valid appropriation for 2009 permanent fund dividends has been enacted into law, funds are currently available for this appropriation in the earnings reserve account, and therefore these dividends can be paid.
> 5. . . . AS 37.13.170 reasonably contemplates that the Corporation should report on the market value of the investments of the principal as well as the market value of the investments of the earnings reserve account. Thus, the unrealized gains and losses attributable to the

earnings reserve account should be accounted for in the earnings reserve account.

Op. Att'y Gen. 2009 (June 16, 2009, File No. JU2009-200-509).

Legislative review is recommended.

Art. XI, sec. 1, Constitution of the State of Alaska

AN INITIATIVE THAT WOULD LIMIT THE DISCHARGE OR RELEASE OF CERTAIN POLLUTANTS BY LARGE MINES ON LAND AND WATER OF THE STATE DOES NOT UNCONSTITUTIONALLY APPROPRIATE A STATE ASSET.

An initiative was proposed that would limit the discharge or release of certain pollutants by large metallic mines into or on the land and waters of the state. The initiative was challenged as being unconstitutional because, it was argued, it amounted to an appropriation of a public asset, in violation of Art. XI, sec. 1, Constitution of the State of Alaska, which prohibits the use of the initiative to appropriate. The Alaska Supreme Court found that the public water of the state is a public asset (public land is also a public asset as determined in prior cases). The court found, though, that the initiative did not constitute an appropriation as it did not impermissibly narrow the legislature's range of freedom to make allocation decisions.

Pebble Limited Partnership v. Parnell, 215 P.3d 1064 (Alaska 2009).

Legislative review is not recommended as the classification of state water as a public asset appears reasonable and the decision regarding use of the initiative for appropriation is of constitutional dimension.

Alaska Civil Rule 68

OFFER OF JUDGMENT MUST ALLOW JUDGMENT TO BE ENTERED AGAINST THE OFFERING PARTY TO QUALIFY FOR FULL ATTORNEY'S FEES UNDER CIVIL RULE 68.

A physician offered to settle a lawsuit filed against him, providing the suit would be dismissed with prejudice. The offer was rejected by the plaintiff. When the physician won at trial, he moved for full attorney's fees under Civil Rule 68. The superior court denied full attorney's fees because Civil

Rule 68 requires a party to offer to allow judgment to be entered in the case, and the offer for dismissal with prejudice did not constitute an offer to allow judgment to be entered. The superior court instead awarded partial fees under Civil Rule 82 to the physician as the prevailing party. The Supreme Court affirmed.

Sayer v. Bashaw, 214 P.3d 363 (Alaska 2009).

Legislative review is not recommended since the decision is consistent with the court rule as adopted, although the legislature may consider amending the court rule to encourage offers of judgment.

7 AAC 27.213

THE RIGHT TO MAKE DECISIONS ABOUT MEDICAL TREATMENTS FOR ONESELF OR ONE'S CHILDREN IS A FUNDAMENTAL LIBERTY AND PRIVACY RIGHT.

State regulations require public school children to be tested for tuberculosis using a purified protein derivative (PPD) skin test, unless a physician or doctor of osteopathic medicine finds that the test would be injurious for a particular child. A couple objected to having the test performed on their two children, and submitted an affidavit signed by a naturopath indicating that the test would be injurious to the children. The court held that the affidavit was not sufficient to comply with 7 AAC 27.213 because it was not signed by an M.D. or D.O. The court also rejected the couple's free exercise challenge to the testing, noting that a personal philosophy is not equivalent to a religion. However, the court accepted the couple's argument that the requirements of 7 AAC 27.213 interfered with their liberty and privacy interests, holding that "the right to make decisions about medical treatments for oneself or one's children is a fundamental liberty and privacy right in Alaska." The court also recognized the state's compelling interest in preventing the spread of tuberculosis in schools. Under Alaska law, a fundamental right may be burdened in order to advance a compelling state interest, but only if no less restrictive means of advancing the state's interest is available. The Supreme Court remanded the case to the superior court to determine whether the parents' interests could be accommodated and the state's needs satisfied through an alternate testing method.

Huffman v. State, 204 P.3d 339 (Alaska 2009).

Legislative review is recommended since the type of testing

and exceptions to testing affect public health and welfare concerns over which the legislature may wish to assert control.

AS 04.21.020
AS 09.17.080

SELLER OF ALCOHOLIC BEVERAGES TO MINOR ONLY LIABLE FOR HARM ATTRIBUTABLE TO THE SELLER.

Minors Vaughn and Walker consumed alcohol they purchased at DelRois Liquor Store and then rode an ATV down an access road where the ATV struck a cable that killed the two minors. Under the Alaska dram shop law, liquor licensees who furnish alcohol to minors may have liability imposed upon them for the damages resulting from the provision of alcohol. Alaska has also adopted various tort reform measures, including comparative negligence (that is, a claimant cannot recover the portion of damages attributable to the claimant's own fault) and pure several liability (judgment is entered against a defendant only for the defendant's own percentage of the total fault). Representatives of the deceased minors argued that AS 04.21.020 (the Alaska dram shop law) was an "exceptional" statute, that is that the goals of the statute (in this case the protection of minors and the prevention of underage drinking) are so compelling that the risk of the application of the comparative negligence and several liability tort reform statutes to the exceptional statute is unacceptable. The Alaska Supreme Court, though, found that classification of the dram shop law as an exceptional statute is incompatible with pure several liability and that, therefore, the dram shop law is subject to comparative negligence and pure several liability.

Sowinski v. Walker, 198 P.3d 1134 (Alaska 2008).

Legislative review is only recommended if the legislature did not intend to apply pure several liability to Alaska's dram shop statute.

AS 09.17.020

STATE'S INTEREST IN PUNITIVE DAMAGES AWARD VESTS AT THE TIME OF THE VERDICT.

An employee sued Alaska Petroleum Contractors for retaliatory discharge and won a $4.3 million punitive damages award along with compensatory damages of $389,000. The state intervened to recover its fifty percent interest in the punitive damages award. While on appeal, the employee settled for $1 million, not specifying the punitive damages.

The state objected, and the employee argued that the state's interest did not vest until receipt of a final judgment or payment of the damages. The court disagreed, interpreting an "award," as used in the statutory phrase "if a person receives an award of punitive damages," as return of a verdict. The court established the announcement of the verdict, rather than entry of a formal judgment, as the point at which the state's statutory right to intervene exists. Any other interpretation, the court reasoned, would give a plaintiff control over state policy by allowing the plaintiff to disregard the state's interest in post-settlement negotiations.

Reust v. Alaska Petroleum Contractors and State of Alaska, 206 P.3d 437 (Alaska 2009).

Legislative review is recommended since the statute is ambiguous as written.

AS 09.43.480(d)

ARBITRATION COSTS MAY NOT BE SPLIT AMONG THE PARTIES.

An employee filed a claim in court for overtime wages under the Alaska Wage and Hour Act but had signed an agreement for binding arbitration. The employee challenged the arbitration agreement on several grounds. The court held that (1) a threshold amount for appeal, as contained in the agreement, was unconscionable but severable; and (2) a requirement that an employee pay a portion of arbitration costs that would exceed the amount of a court filing fee was inconsistent with public policy goals underlying the AWHA .

Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091 (Alaska 2009).

Legislative review is recommended to codify in statute the holding of the court or to consider adopting some other policy.

AS 11.46.565
AS 11.46.990(10)

CRIMINAL IMPERSONATION IN THE FIRST DEGREE REQUIRES PROOF THAT A PERSON'S FINANCIAL REPUTATION WAS HARMED.

A person commits the crime of criminal impersonation in the first degree if the person does certain acts in another person's name, such as opening an account at a bank, obtaining a credit card or identification documents, or obtaining property or

services and the person damages the financial reputation of the other person. "Financial reputation" is defined to mean a person's ability to obtain a loan, open a credit or financial institution account, obtain property or services on credit, or creditworthiness in a credit report. Phillips was charged and convicted of a number of theft and related offenses including criminal impersonation of Sturm and Roberts. Sturm testified that his credit report had a number of bad marks on it due to Phillips' passing of forged bad checks on Sturm's account. The Alaska Court of Appeals found that this was sufficient to show damage to financial reputation. Roberts, though, testified that he did not know if Phillips' actions in forging and negotiating bad checks on his account (those checks had been turned over to collection agencies) had any effect on his credit report and that he had continued to bank without problem, had not attempted to take out any loans and did not know if his credit or ability to obtain credit had been adversely affected. The court found that without any evidence of damage to Roberts' financial reputation that Phillips' conviction for criminal impersonation of Roberts had to be reversed.

Phillips v. State, 211 P.3d 1148 (Alaska App. 2009).

Legislative review is recommended to determine if the definition of "financial reputation" should be amended or if damage should be presumed when certain negative effects, such as referrals to collection agencies, are suffered by the victim.

AS 11.61.127

MERE VIEWING OF CHILD PORNOGRAPHY ON THE INTERNET DOES NOT AMOUNT TO POSSESSION OF CHILD PORNOGRAPHY.

Worden was convicted of possession of child pornography when child pornography images were found in his browser cache. No evidence was introduced that Worden made any attempt to store the images or otherwise knew that his browser stored the images in a cache or that Worden's intent was anything other than to simply view the images on a computer screen while he was at a website. The Alaska Court of Appeals found that AS 11.61.127 proscribes the possession of child pornography and than the mere viewing of child pornography on a computer did not amount to possession.

Worden v. State, 213 P.3d 144 (Alaska App. 2009).

Legislative review is recommended if the legislature desires to proscribe the viewing of child pornography without a person actually undertaking any effort to possess it.

AS 11.71.060

CHALLENGE TO RECRIMINALIZATION OF SMALL AMOUNTS OF MARIJUANA NOT RIPE FOR DECISION.

"In June 2006 the Alaska Legislature amended AS 11.71.060(a) to prohibit the possession of less than one ounce of marijuana. The American Civil Liberties Union of Alaska and two anonymous individuals . . . sued for declaratory and injunctive relief. They argued that section .060 as amended conflicts with the privacy clause of the Alaska Constitution, as interpreted in *Ravin v. State* [537 P.2d 494 (Alaska 1975)], to the extent that it criminalizes possession of small amounts of marijuana in the home by adults for personal use." The trial court found that the amended AS 11.71.060 was unconstitutional under *Ravin* and the state appealed. The Alaska Supreme Court ruled that the issue was not ripe for adjudication as "it does not arise from an actual prosecution brought under the amended statute." A decision on the consitutionality of AS 11.71.060 and whether *Ravin* precludes the state from proscribing the use of small amounts of marijuana by an adult in their own home must arise from an actual criminal prosecution.

State v. American Civil Liberties Union, 204 P.3d 364 (Alaska 2009).

The viability of AS 11.71.060 as applied to the possession of marijuana by an adult in their own home remains in question as *Ravin v. State* is still the law of Alaska until overruled or reinterpreted by the Alaska Supreme Court. Under this decision, any review must wait until someone is prosecuted for a violation of AS 11.71.060 and that person challenges that prosecution on privacy grounds.

AS 12.55.025(c)

NO CREDIT FOR TIME SERVED UNDER AS 12.55.025(C) FOR RESIDENTIAL TREATMENT WHILE ON PAROLE.

Triplett was convicted of felony driving while intoxicated and sentenced to a period of incarceration. After serving a period of incarceration, Triplett was granted discretionary parole and

as part of the parole was required to participate in a residential substance abuse treatment program. Triplett continued on probation for a period of suspended imprisonment after he completed his parole, but after a number of probation violations his probation was revoked and he was again incarcerated to complete the previously suspended portions of his sentence. Triplett argued that he was entitled to credit for time served for the period of time he spent in the residential treatment center under AS 12.55.025(c). The Alaska Court of Appeals disagreed, finding that AS 12.55.025(c) only allows "credit for time spent in custody pending trial, sentencing, or appeal . . ." As Triplett's period of residential treatment was part of his parole and was "post-trial, sentencing, or appeal" no credit was due.

Triplett v. State, 199 P.3d 1179 (Alaska App. 2008).

As the credit sought by Triplett was for time spent in a treatment center post-trial, sentencing, and appeal, the decision appears to correctly apply the statute and legislative review is not recommended unless the legislature desires to provide credit for time served in treatment facilities while on parole.

AS 12.72.010(4)
AS 12.72.020(b)(2)

CONVICTED INMATE DOES NOT HAVE RIGHT TO FURTHER TESTING OF DNA EVIDENCE.

An inmate sought post-conviction relief claiming that he received ineffective assistance of counsel because his counsel did not request certain DNA testing of crime scene evidence. The Alaska court denied relief. The inmate also sued the district attorney's office asking for access to evidence so that he could have the evidence tested at his expense. The Ninth Circuit Court of Appeals affirmed the district court holding, which found that the DNA testing had been unavailable at trial, that the test could be accomplished at almost no cost to the state, and that the results were likely to be material. A divided United States Supreme Court reversed the Ninth Circuit decision, denying the inmate's request, and holding that the issue of access to DNA evidence after conviction was best left to Congress and state legislatures, and that the existing state statues were adequate.

District Attorney's Office v. Osborne, ___ U.S. ___; 129 S. Ct. 2308; 174 L. Ed. 2d 38 (2009).

Legislative review is recommended.

AS 13.12.514

AN ORAL CONTRACT TO MAKE A DEVISE OF PROPERTY IS UNENFORCEABLE.

A granddaughter claimed that the home of her deceased grandmother was transferred to her before, not after, the grandmother's death since her grandmother promised the home to her if she cared for the grandmother until her death. AS 13.12.514 requires that a devise of property be included in a will or some other written contract. In this case, the grandmother had not included the devise in her will or otherwise reduced the alleged oral promise to writing. The court held that since performance on the contract could not be completed until the grandmother's death, the oral promise was a devise of property that was unenforceable under the statute.

Cragle v. Gray, 206 P.3d 446 (Alaska 2009).

Legislative review is not recommended since the court applied the statute as written.

AS 15.40.330

VOTING REQUIREMENTS FOR REJECTION OF SENATE VACANCY APPOINTMENTS.

The Attorney General addressed the rejection of appointments by Governor Palin to fill the Senate seat created by the resignation of Senator Elton. The Attorney General acknowledged the tradition of privately confirming or rejecting appointments made by the governor to fill a vacancy, but restated previous concerns about the practice. The opinion asserts that the meetings considering the appointments must be noticed, convened with a quorum, and a public vote of members of the same political party which nominated the predecessor must be taken in open session.

Op. Att'y Gen. 2009 (April 20, 2009, File No. 2009 Alas. AG LEXIS 1).

Legislative review is recommended.

AS 18.07.081

THE TRANSFER OF A CERTIFICATE OF NEED BY ONE HALF OF A JOINT VENTURE IMPLICATES PROPERTY INTEREST FOR MISUSE OF PROPERTY CLAIM.

Two partnerships with overlapping partners entered into a joint venture to construct and operate a surgery center in

Anchorage. Fifteen years after the sale of the surgery center, two of the original partners lobbied for a change in the certificate of need (CON) law to allow a transfer of the CON by half of the joint venture to a new facility located nearby, as long as the health facility no longer operated in its original location. A new facility was built using the original CON. The remaining partners sued for misuse of partnership property, among other things. In a case of first impression, the court held that a CON conferred a property interest rather than a temporary right to construct. The court found that the CON existed to limit competition both in the construction and operation of a health care facility and interpreted the authorizing statute to confer the property interest indefinitely unless a violation of the terms and conditions of the CON occurred.

Beal v. McGuire, 216 P.3d 1154 (Alaska 2009).

Legislative review is recommended to determine the duration of the interest conferred by a certificate of need.

AS 18.07.111

CERTIFICATE OF NEED REQUIREMENT FOR DIAGNOSTIC TESTING FACILITY AND EXCLUSION OF PRIVATE PHYSICIAN'S OFFICE UPHELD ON CONSTITUTIONAL GROUNDS.

A radiology group that purchased a magnetic resonance imaging machine challenged the statutory definition of "health care facility" that applied to certificates of need. The statute had been amended to include diagnostic testing facilities but excluded private physicians' offices. The court upheld the statutory changes on constitutional grounds, finding that the statute treated all facilities and offices neutrally without regard to type of medical practice. But the court remanded the case for a factual determination of whether the radiology practice was a private physician's office that was exempt from the certificate of need requirements.

Bridges v. Banner Health, 201 P.3d 484 (Alaska 2008).

Legislative review is recommended to ensure that the intended distinction between a diagnostic testing facility and a private physician's office is sufficiently clear.

AS 22.07.020(d)(2)

STATE'S RIGHT TO TAKE INTERLOCUTORY APPEALS NOT AFFECTED BY STATUTORY CHANGE TO AS 22.07.020(d)(2).

The state appealed the dismissal of the indictment against Waterman. Waterman argued that the state has no right of appeal in this case as the dismissal is not a final order, as the state could always seek a new indictment. AS 22.07.020(d)(2) provides the state with a right of appeal in all actions and proceedings except that the state's "right of appeal in criminal cases is limited by the prohibitions against double jeopardy." The Alaska Court of Appeals found that this provision does not affect the state's right to seek interlocutory appeals (that is appeals from non-final orders, such as an appeal from an order dismissing an indictment).

State v. Waterman, 196 P.3d 1115 (Alaska App. 2008).

Based upon the available legislative history it appears that the court has correctly applied the intent of the legislature, therefore legislative review is not recommended.

AS 23.10.060(d)(19)

RETROACTIVE APPLICATION OF EXEMPTION FROM THE ALASKA WAGE AND HOUR ACT UNCONSTITUTIONAL.

In 2003, the legislature passed an amendment to the Alaska Wage and Hour Act that exempted pilots from the overtime compensation provision in the Act. While three lawsuits challenging the amendment were pending, the legislature in 2005 enacted a retroactivity clause to include work performed since January 1, 2000, making the amendment applicable to all actions and proceedings that were not decided by the effective date of the retroactivity clause of May 18, 2005. The Supreme Court found the retroactive application of the exemption violated both the takings and contracts clauses of the Alaska Constitution and affirmed the damages awarded in the pending actions in 2007.

Hageland Aviation v. Harms, 210 P.3d 444 (Alaska 2009).

Legislative review is not recommended since the constitutionality of legislation is a question for the courts to resolve.

AS 23.30.105(a)

WORKERS' COMPENSATION CLAIM FOR PRESUMED DEATH TIMELY WHEN DEATH CERTIFICATE IS DELAYED.

In 1997, an employee disappeared in an apparent industrial accident that was witnessed. The body was never recovered and, when the employee's wife petitioned in 1997 for a presumptive death certificate, it was denied for insufficient evidence. Six years later, the son filed another petition in 2003. A workers' compensation claim was then filed in 2004, within one year of the issuance of the death certificate. The time periods established in the statute that authorized a presumption of death after five years and the statute of limitations for filing a workers' compensation claim within one year of a death resulted in the superior court's denial of the claim as untimely. The Supreme Court reversed, finding that since the workers' compensation statute did not specify acceptable proof of death and since the family had acted reasonably, the statute of limitations was tolled until the death certificate was finally issued.

Irby v. Fairbanks Gold Mining, 203 P.3d 1138 (Alaska 2009).

Legislative review is recommended to specify by statute the types of evidence acceptable to prove death for workers' compensation purposes.

AS 23.40.200

AWARD OF INTEREST TO PUBLIC EMPLOYEE IN BINDING ARBITRATION WAS NOT GROSS ERROR; COURT FINDS AMBIGUITY IN STATUTE RELATING TO PREJUDGMENT INTEREST ON CONTRACT CLAIMS UNDER STATE PROCUREMENT CODE.

A state employee challenged his termination from employment in a binding arbitration proceeding under the Public Employee Relations Act. The employee prevailed, and the arbitrator awarded him back pay as well as interest. The state appealed the interest award.

The court recognized the tension between two precedential principles, the principle of requiring an express legislative waiver of sovereign immunity, as articulated in Hawken Northwest, Inc. v. State, Department of Administration, 76 P.3d 371, 382-83 (Alaska 2003), and the principle that consent to arbitration amounts to a waiver of sovereign immunity, expressed in Native Village of Eyak v. GC Contractors, 658

P.2d 756 (Alaska 1983). The court did not resolve this tension. Instead, the court assumed that the arbitrator had decided that sovereign immunity did not bar the award of interest, held that this conclusion did not constitute gross error on the part of the arbitrator, and so upheld the award of interest.

In its analysis, the court described the scope of AS 36.30.623, added by the legislature in 2001, a section of the State Procurement Code authorizing payment of prejudgment interest, as "ambiguous." Its comment was based in part on an observation made in an earlier decision. This section includes a definition of "department," specifically meaning the Department of Transportation and Public Facilities, that limits application of the prejudgment interest authorization to claims involving that department. The court, in the earlier decision and in a note in this case, indicated that it was prepared to give the section a more expansive application, relating that "for discussion purposes that the provision [AS 36.30.623] would apply to claims filed against other agencies," and that "[t]he state procurement code itself broadly applies to the procurement of supplies, services, or professional services by state agencies and instrumentalities."

State v. Alaska Public Employees Association, 199 P.3d 1161 (Alaska 2008).

The court's decision questions the scope of the statute that authorizes payment of prejudgment interest on certain contract claims. The legislature should review the definition of "department" set out in AS 36.30.623 as it applies to authority to pay prejudgment interests so that, if the legislature agrees with the court's expression about the scope of the statute's application, it may revise or delete the specific definition. By so doing, the legislature would eliminate the ambiguity identified in the decision so that the text of the statute conforms to the court's indication of a belief that prejudgment interest should be authorized on claims against all state agencies subject to the State Procurement Code.

AS 25.23.140(b)

AN ADOPTION DECREE MAY NOT BE SET ASIDE FOR MISTAKE OR FOR THE BEST INTEREST OF THE CHILD.

A teenage mother consented to the adoption of her child by her father and stepmother but retained general visitation rights.

When the visitation was restricted by the adoptive parents less than one year later, the teenager successfully petitioned the superior court to set aside the adoption decree on the grounds of mistake and the child's best interest. The Supreme Court reversed. AS 25.23.140(b) provides that an adoption decree may not be questioned more than one year after its issuance by any person for any reason. This case explored reasons for which a decree might be challenged within the one-year timeframe. While acknowledging that the grounds for setting aside an adoption decree are not limited to those listed in AS 25.23.140(b), the court held that confusion, mistake about the finality of the decree, and change of heart are generally insufficient grounds for invalidating consent. The court also found that it was error to apply a best interests analysis in setting aside a decree.

In re Adoption of S.K.L.H., 204 P.3d 320 (Alaska 2009).

The court is implementing the legislative purpose of the statute by precluding modification of an adoption decree after more than one year after issuance. However, legislative review is recommended as the legislature may wish to provide the courts with additional guidance specifying the circumstances in which an adoption decree may be successfully challenged within the one-year timeframe.

AS 25.24.150(g)

INTERPRETING THE PHRASE "SERIOUS PHYSICAL INJURY" FOR CUSTODY PURPOSES, COURT APPLIES CRIMINAL LAW DEFINITION.

An ex-wife appealed a court award of joint physical custody of her daughter based upon the presumption against awarding joint custody in circumstances involving serious physical injury from domestic violence. Interpreting the phrase, "serious physical injury" for custody purposes, the court applied a criminal law definition since the legislature had not included a different definition in the custody statutes. In this case, the standard was not met by the circumstances of the domestic violence and therefore the presumption did not apply on those grounds.

Parks v. Parks, 214 P.3d 295 (Alaska 2009).

Legislative review is recommended to determine whether the phrase "serious physical injury" should be defined differently for custody purposes and for criminal purposes.

AS 28.01.010

MUNICIPAL TRAFFIC ORDINANCES THAT ARE NOT INCONSISTENT WITH STATE TRAFFIC REGULATIONS ARE VALID EVEN IF NO CORRESPONDING STATE REGULATION OR STATUTE EXISTS OR THE CORRESPONDING REGULATION OR STATUTE HAS BEEN REPEALED.

Hamilton was charged with violation of a municipal ordinance that prohibited a driver from accelerating a vehicle "so rapidly as to unnecessarily cause the tires to squeal or spin." At the time the ordinance was enacted the state had a similar regulation but the state regulation was repealed in 1979. The superior court dismissed the case, finding that the purpose of AS 28.01.010 was to ensure the uniformity of traffic laws throughout the state. The Alaska Court of Appeals stated the issue presented on appeal as:

> AS 28.01.010(a) declares that "[a] municipality may not enact [a traffic] ordinance that is inconsistent with the provisions of [Title 28 of the Alaska Statutes] or the regulations adopted under [that] title." The question presented in this appeal is whether the City and Borough of Juneau's traffic ordinance became "inconsistent" with state law -- and thus became unlawful -- by virtue of the 1979 repeal of the corresponding state regulation.

The court of appeals held that total uniformity between state and municipal laws is not required and a local ordinance only violates AS 28.01.010 if it is inconsistent with state law, that is as explained by the court, whether the ordinance frustrates a policy expressed by the state. The court of appeals found that the municipal ordinance does not frustrate any state policy.

State v. Hamilton, 216 P.3d 547 (Alaska App. 2009).

Legislative review is recommended to consider the extent of deviation that is permitted under the Alaska Uniform Traffic Laws Act. Uniformity of traffic laws is the policy behind AS 28.01.010 so that motorists are not presented with a myriad of different laws as they travel throughout the state. Allowing ordinances that differ from state law would seem to work against this general purpose especially since AS 28.01.010(b) provides a way for municipalities to enact ordinances that are necessary to meet specific local requirements.

AS 28.35.030

PRECLUDING EVIDENCE RELATING TO THE LEVEL OF INTOXICATION AT THE TIME OF DRIVING IS UNCONSTITUTIONAL WHEN A PERSON IS PROSECUTED FOR DRIVING UNDER THE INFLUENCE.

AS 28.35.030(a) makes it a crime to drive under the influence of an alcoholic beverage, inhalant, or controlled substance. A person can violate the law by operating or driving a motor vehicle or operating an aircraft or watercraft (1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance or (2) with a blood alcohol level of .08 or higher determined by a test administered within four hours of driving. In 2004, in response to a request from the Department of Law, the legislature amended the statute to specify that the blood alcohol form of the offense is committed when the defendant's blood alcohol is determined by a chemical test to be at the proscribed level within a four hour period after the offender was driving. Further, the legislature prohibited defendants from offering evidence that their blood alcohol level at the time they were driving was actually less than the test results due to their having drank large amounts of alcohol or taken "big gulps" shortly before they were arrested. Valentine was charged with driving under the influence generally under AS 28.35.030 and the charging documents did not specify which form of the statute he was accused of violating. At trial, Valentine was not allowed to present evidence that he was not under the influence of an alcoholic beverage when driving as his drinking had occurred shortly before his arrest and the alcohol was not yet completely absorbed into his system. Such evidence would have been relevant to whether Valentine was under the influence at the time of driving under AS 38.35.030(a)(1) but would have been precluded under the .08 blood alcohol level theory of AS 28.35.030(a)(2). Valentine was convicted of drunk driving under AS 28.35.030 that did not specify which paragraph of the statute he had violated. The Alaska Court of Appeals held that because the general verdict did not specify which theory provided the basis for Valentine's conviction, his conviction had to be reversed.

Valentine v. State, 215 P.3d 319 (Alaska 2009).

Legislative review is not recommended as the decision appears to be correct. The reversal in this case probably could have been avoided if Valentine had been charged under

AS 28.35.030(a)(2), the blood alcohol theory of drunk driving, instead of generally under AS 28.35.030.

AS 29.26.110(a)(3)

NEW TEST OF WHETHER A BALLOT INITIATIVE RELATES TO A LEGISLATIVE OR ADMINISTRATIVE MATTER ADOPTED BY COURT.

The clerk of the City of Saint Paul refused to certify a proposed ballot initiative to prevent the city from selling electricity in part on the grounds that she considered the initiatives to relate to an administrative matter outside of the citizen initiative authority. The court, interpreting for the first time a statutory codification of common law initiative-enactment restrictions, established a three-part test for determining whether an initiative relates to a legislative or an administrative matter. The test requires an analysis of whether the initiative (1) enacts temporary or permanent law; (2) makes new law or executes existing law; (3) declares a public purpose or deals with a small segment of a larger policy question. Applying this test to the municipal electric utility ban contained in the proposed initiative, the court upheld the approval of the initiative by the lower court as relating to a legislative matter.

Swetzof v. Philemonoff, 203 P.3d 471 (Alaska 2009).

Legislative review is recommended to determine whether the applied test for initiative approval is consistent with legislative intent.

AS 33.20.010

GOOD TIME CREDITS AVAILABLE TO PRISONERS FOR TIME SPENT IN A CORRECTIONAL FACILITY NOT JUST A STATE CORRECTIONAL FACILITY.

Bourdon was incarcerated in a state correctional facility and then released on parole. Bourdon apparently violated his parole and was arrested by the Department of Corrections and placed at a halfway house in Juneau. The Department of Corrections places prisoners at the halfway house pursuant to a contract with the halfway house operator. Bourdon argued that he was entitled to a good time credit under AS 33.20.010 for his good behavior while he was confined at the halfway house. The department argued that AS 33.20.010 good time credits are only available for confinement at state correctional facilities, that is correctional facilities that are owned or

operated by the state. The Alaska Court of Appeals found that Bourdon was entitled to the good time credit because AS 33.20.010 provides the credit "if the prisoner follows the rules of the correctional facility in which the prisoner is confined." Since the definition of correctional facility in AS 33.30.901 includes halfway houses, and since the legislature specifically defines "state correctional facility" as "a correctional facility owned or run by the state" and uses the term "state correctional facility" in other contexts, the legislature's use of the broader term "correctional facility" here means that Bourdon is entitled to the good time credit.

State v. Bourdon, 193 P.3d 1209 (Alaska App. 2008).

The court's analysis appears correct. Legislative review is not recommended unless the legislature wishes to restrict the availability of good behavior credits to only those prisoners serving time in a *state* correctional facility.

AS 34.03.310(a)(2)

EVICTION AFTER PERSONAL INJURY SUIT FILED BY TENANT NOT UNLAWFUL RETALIATION.

A tenant sued his landlord for damages arising from personal injuries sustained on the landlord's property and the landlord evicted the tenant. The court, in a case of first impression, held that a tenants' threat of or filing of a personal injury lawsuit for damages was not an effort to "enforce rights and remedies" granted under the Uniform Residential Landlord and Tenant Act and therefore could not form the basis of a retaliation claim under the Act.

Helfrich v. Valdez Motel Corporation, 207 P.3d 552 (Alaska 2009).

Legislative review is not recommended unless the legislature intended AS 34.03.310(a)(2) to protect tenants who assert personal injury claims against landlords, or other claims not based on the Uniform Residential Landlord and Tenant Act, from retaliatory eviction.

AS 39.52

ATTORNEY GENERAL'S ANALYSIS AND RECOMMENDATIONS TO IMPROVE IMPLEMENTATION OF THE ALASKA EXECUTIVE BRANCH ETHICS ACT.

Following an analysis of issues relating to the Alaska Executive Branch Ethics Act (AS 39.52) investigative process, the attorney general recommended that (1) the Ethics Act be amended to eliminate the requirement that the attorney general serve the complainant with his predispositional recommendations, and to delay notification to the complainant until the matter is concluded; and (2) the personnel board should be given the authority to order reimbursement of fees and costs from a person who has filed a complaint in bad faith. The opinion concluded that executive branch agencies have the authority to pay or reimburse the legal expenses of public officers incurred in defending against ethics complaints if four conditions are met: (1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds to pay the expenses.

2009 Op. Att'y Gen. (August 5, 2009, File No. AN2009102807).

Legislative review is available if changes are desired.

AS 39.52

REPORT REGARDING THE GOVERNOR'S TRANSFER OF THE COMMISSIONER OF PUBLIC SAFETY TO THE POSITION OF DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL BOARD; COMPLAINT OF PUBLIC SAFETY EMPLOYEES ASSOCIATION ALLEGING IMPERMISSIBLE ACCESS TO CONFIDENTIAL PERSONNEL AND WORKERS' COMPENSATION RECORDS; AND REQUEST BY THE COMMISSIONER OF PUBLIC SAFETY TO THE PERSONNEL BOARD FOR A HEARING TO CLEAR NAME AND PROTECT REPUTATION.

A report to the Alaska Personnel Board addresses issues relating to the application of the Alaska Executive Branch Ethics Act to three matters: (1) questions presented by the Governor relating to transferring the Commissioner of Public Safety to the position of Director of the Alcoholic Beverage Control Board; (2) a complaint by the Public Safety

Employees Association alleging improper access to confidential personnel and workers' compensation records; and (3) a request by the former Commissioner of Public Safety for a public hearing before the Personnel Board to clear his name and protect his reputation. The report provided a critique of the Branchflower Report prepared for the Legislative Council addressing the same issues and reached materially different conclusions. The reported concluded that:

> 1. There is no probable cause to believe that Governor Palin violated the Alaska Executive [Branch] Ethics Act by making a decision to dismiss Department of Public Safety Commissioner Monegan and offering him instead the position of Director of the Alcohol [sic] Beverage Control Board.
> 2. There is no probable cause to believe that Governor Palin violated the Alaska Executive [Branch] Ethics Act in any other respect in connection with the employment of Alaska State Trooper Michael Wooten.
> 3. There is no basis upon which to refer the conduct of Governor Palin to any law enforcement agency in connection with this matter because Governor Palin did not commit the offences of Interference with Official Proceedings or Official Misconduct.
> 4. There is no probable cause to believe that any other official of state government violated any substantive provision of the Ethics Act.
> 5. There is no legal basis or jurisdiction for conducting a "Due Process Hearing to Address Reputational Harm" as requested by former Commissioner Walter Monegan.
> 6. The Amended Complaint by the PSEA should be dismissed.
> 7. The Independent Counsel recommends that the appropriate agency of State government address the issue of private use of emails for government work and revisit the record retention policies of the Governor's Office.

because ethics act does not prohibit benefit to "personal interest"?

Op. Att'y Gen. 2008 (November 3, 2008, 2008 Alas. AG LEXIS 12)

Legislative review is recommended.

AS 40.25.122
18 AAC 15.237

A STATE AGENCY'S REGULATION DENYING A LITIGANT ACCESS TO PUBLIC RECORDS UNTIL THE RECORDS ARE CERTIFIED AS COMPLETE BY THE AGENCY VIOLATES DUE PROCESS RIGHTS.

This decision implicates the Alaska Public Records Act. The Department of Environmental Conservation withheld public records of oil tanker and shipping company contingency plans for discharges on the basis that the individuals requesting the records had filed an appeal of the department's approval of the plans, and that an agency regulation (18 AAC 15.237) required that the record be certified as complete before litigants were granted access to the record. The court found that the litigants had a "strong interest in accessing the record," and that the department had offered no valid governmental interest in denying that access pending certification. The regulation therefore placed an undue burden on the litigants' due process rights.

In a note to the decision (note 32), the court for the second time called attention to language in AS 40.25.122 that "inexplicably 'limits access to otherwise public records,'" giving rise to a potential equal protection challenge to the statute. The court's reference is to the statute's express requirement that "person[s] involved in litigation" with the state should use discovery procedures under the appropriate procedure rules to obtain documents rather than simply reviewing and copying those that are already publicly available under the Act.

Copeland v. Ballard, 210 P.3d 1197 (Alaska 2009).

To eliminate the possible equal protection challenge that the court identified, legislative review of that requirement of the statute is recommended.

AS 43.56.010(b)
AS 43.56.010(c)
AS 43.56.210(5)
AS 29.45.080(b)

MUNICIPAL ORDINANCE TAXING THE VALUE OF OIL TANKER AS PERSONAL PROPERTY VIOLATED THE TONNAGE CLAUSE.

Oil tanker owners challenged an ordinance of the City of Valdez imposing a personal property tax that applied almost exclusively to the value of large oil tankers traveling to and from the city. The owners argued that the tax violated the Tonnage Clause, U.S. Const. Art. I, sec. 10, cl. 3, which prohibits states, without Congress' consent, to lay any duty of

tonnage. The United States Supreme Court held that the ordinance violated the Tonnage Clause because (1) the Tonnage Clause prohibits all taxes and duties regardless of their name or form, even though not measured by tonnage; (2) the ordinance imposed a charge for the privilege of entering, trading in, or lying in a port; (3) the ordinance taxed only large ships in the city's port and no other form of personal property; (4) the amount of the tax depended upon the ship's capacity; (5) the tax raised revenue for general municipal services; (6) the ordinance applied primarily to oil tankers; (7) the tax differed from the tax on other oil-related property under AS 43.56.210, in that it was a purely municipal tax with no effective electorate-related check upon the city's vessel-taxing power.

Polar Tankers v. City of Valdez, ___ U.S. ___, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009).

Legislative review is not recommended.

AS 47.14.100(b)

STATE PAYMENTS FOR FOSTER CARE FOUND TO BE PROPERTY INTEREST OF FOSTER PARENT THAT REQUIRES DUE PROCESS BEFORE THE STATE MAY RECOUP OVERPAYMENTS.

Alleged prior overpayments to a licensed foster parent by the state were recouped by the state through a deduction from future monthly foster care payments without a hearing. Although the payments were intended to reimburse parents for expenses of caring for a foster child, the court held that the payments affected the foster parents' property interests. The state must provide due process (notice and an opportunity to be heard) before recouping overpayments.

Heitz v. State, 215 P.3d 302 (Alaska 2009).

Legislative review is recommended to consider changes to reimbursement and repayment procedures to limit the possibility of overpayment by the state.

AS 47.30.655
AS 47.30.730

INVOLUNTARY COMMITMENT OF PSYCHIATRIC PATIENT ALLOWED FOR MENTAL ILLNESS WITHOUT EVIDENCE THAT TREATMENT WILL LEAD TO IMPROVEMENT IF PATIENT IS LIKELY TO CAUSE HARM TO SELF OR OTHERS.

A patient who was involuntarily committed to a psychiatric hospital appealed on the grounds that treatment would not lead to improvement in his condition, which involved organic brain damage from chemical use. The patient based his argument on a guiding principle of the 1981 revision of the civil commitment statutes, codified at AS 47.30.655: "that persons who are mentally ill but not dangerous to others be committed only if there is a reasonable expectation of improving their mental condition." The court identified this section as a statement of purpose, and found that it conflicted with AS 47.30.730, which does not require a petition for involuntary commitment to allege that the patient's condition could be improved if the patient is likely to cause harm to self or others. The court affirmed the commitment based on the substantive statute.

E.P. v. Alaska Psychiatric Institute, 205 P.3d 1101 (Alaska 2009).

Legislative review is not recommended unless the legislature wishes to reconcile the legislative statement of purpose and the substantive law.

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