STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-NINTH 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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2016

A REPORT TO THE TWENTY-NINTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals, Delayed Enactments, 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2017, and March 1, 2018, according to laws enacted before the 2017 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2015, and September 30, 2016,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2015, and September 30, 2016.

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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 2016 Legislature, will be repealed or amended before March 1, 2017, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions, federal court decisions, and opinions of the Attorney General were prepared by Hilary Martin, Susie Shutts, and Megan Wallace, Legislative Counsel, and Jean Mischel, Assistant Revisor of Statutes. Lisa Kirsch, 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, 2017 and March 1, 2018 according to laws enacted before the 2017 legislative session

Laws enacted in 2012

Ch. 27, SLA 2012, secs. 23 and 28 -- Leases and Disposal of State Land and Materials

AS 38.05.945(b)	amended July 1, 2017

Ch. 58, SLA 2012, secs. 3, 6, 8, 11, and 16 -- Commercial Fishing Loans

AS 16.10.320(j)	amended June 30, 2017
AS 16.10.340(a)	amended June 30, 2017
AS 16.10.342(c)	amended June 30, 2017
AS 16.10.345	repealed June 30, 2017
AS 16.10.350(a)	amended June 30, 2017

Ch. 61, SLA 2012, sec. 5 -- Tax Credit Assistance Guarantee and Loan Program

AS 29.45.030(a)	amended November 30, 2017

Laws enacted in 2014

Ch. 83, SLA 2014, sec. 35 -- Crime, Corrections, and Recidivism

AS 22.20.210	repealed June 30, 2017

Laws enacted in 2015

Ch. 2, SSSLA 2015, secs. 4, 6, 7, 8, 10, 14, 20, 22, 23, and 28 -- Sexual Abuse and Assault Awareness

AS 14.03.110(a)	amended June 30, 2017
AS 14.08.111(12)	amended June 30, 2017
AS 14.14.090(11)	amended June 30, 2017
AS 14.16.020(9)	amended June 30, 2017
AS 14.20.020(k)	enacted June 30, 2017
AS 14.30.355	enacted June 30, 2017
AS 14.30.356	enacted June 30, 2017
AS 47.17.020(a)	amended June 30, 2017
AS 47.17.020(j)	amended June 30, 2017
AS 47.17.022(b)	amended June 30, 2017
AS 47.17.022(e)	enacted June 30, 2017
AS 47.17.290(1)	amended June 30, 2017

Laws enacted in 2016

Ch. 36, SLA 2016, secs. 50, 55-63, 98, and 117 -- Omnibus Crime Bill and Civil in Rem

AS 12.25.150(a)	amended January 1, 2018
AS 12.30.006(b) - (d)	amended January 1, 2018
AS 12.30.006(f)	amended January 1, 2018
AS 12.30.011	amended January 1, 2018
AS 12.30.016(b) - (c)	amended January 1, 2018
AS 12.30.021(a) and (c)	amended January 1, 2018
AS 12.70.130	amended January 1, 2018
AS 33.07.010 - 33.07.090	enacted January 1, 2018

Ch. 39, SLA 2016, secs. 2 - 4 -- Real Estate Brokers	
AS 08.088.171(a) and (b)	amended January 1, 2018
AS 08.088.172(e)	repealed January 1, 2018
Ch. 54, SLA 2016, secs. 12, 14, and 16 -- Education	
AS 14.08.111(12)	amended June 30, 2017
AS 14.14.090(11)	amended June 30, 2017
AS 14.16.020(9)	amended June 30, 2017
Ch. 4, 4SSLA 2016, secs. 29 and 34 -- AOGCC Powers and Duties, Tax Credits	
AS 43.55.165(j)	repealed January 1, 2018
AS 43.55.165(k)	repealed January 1, 2018

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunset of advisory boards and task forces, and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

PROPER LEGAL CATEGORIZATION OF FINDINGS OF FACT IS AN ISSUE OF LAW, NOT AN ISSUE OF FACT ON APPELLATE REVIEW.

The defendant was convicted of felony driving under the influence. The superior court held an evidentiary hearing and made findings of fact regarding what happened during the defendant's encounter with the police. Based on the findings of fact, the superior court concluded that the defendant's encounter amounted to an investigatory stop, but that the investigatory stop was supported by reasonable suspicion. On appeal, the Alaska Court of Appeals held that, given the facts found by the superior court, the defendant's encounter did not amount to an investigatory stop. The defendant then filed a petition for rehearing on the issue.

The defendant argued that the superior court's conclusion that the defendant was subjected to an investigatory stop was a finding of fact that the Alaska Court of Appeals was required to defer to, not a conclusion of law that could be independently reviewed. The Court of Appeals held that "[a] trial court's findings of *historical fact* are reviewed deferentially, under the 'clearly erroneous' standard; but the proper *legal categorization* of those facts -- *i.e.*, the assessment of the legal consequences of the trial court's findings of fact -- is a question of law that the appellate court evaluates *de novo*." Accordingly, the Court of Appeals ruled that it acted correctly in independently evaluating whether the facts of the defendant's case constituted an investigatory stop.

Meyer v. State, 368 P.3d 613 (Alaska App. 2016).

Legislative review is not recommended.

Art. I, secs. 1 and 22, Constitution of the State of Alaska, AS 18.16.010 - AS 18.16.040, AS 25.20.025(a)

LAW REQUIRING ADVANCE PARENTAL NOTICE BEFORE A PHYSICIAN MAY TERMINATE A MINOR'S PREGNANCY IS UNCONSTITUTIONAL.

Alaska law historically allowed minors to consent to pregnancy-related health services, except for terminations. A 2007 Alaska Supreme Court ruling allowed minors to obtain

all pregnancy-related health care, including pregnancy termination, without parental consent. In the 2007 ruling, the Court held that parental consent infringed on fundamental privacy rights and was not the least restrictive means of furthering the state's interests in protecting minors and aiding parents. The Court also then stated that a parental notification law *might* be implemented without unduly interfering with minors' fundamental privacy rights. As a result, in 2010, voters approved an initiative titled the "Parental Notification Law," which included specific requirements for parental notification, a 48-hour mandatory waiting period between parental notification and the termination of a minor's pregnancy (absent earlier written parental consent), and criminal and civil penalties for any physician who terminates a minor's pregnancy without complying with the notification requirements.

In construing the Parental Notification Law, the Alaska Supreme Court was presented with two specific and distinctly different questions:

> (1) Does the Notification Law violate the Alaska Constitution's equal protection guarantee by unjustifiably burdening the fundamental privacy rights only of minors seeking pregnancy termination, rather than applying equally to all pregnant minors? (2) If the Notification Law does not violate the Alaska Constitution's equal protection guarantee, does it violate the Alaska Constitution's privacy guarantee by unjustifiably infringing on the fundamental privacy rights of minors seeking to terminate a pregnancy?

The Court ultimately held that the Parental Notification Law violated the Constitution of the State of Alaska's equal protection guarantee and could not be enforced. The Court reasoned that the state's "asserted interests do not justify a distinction between pregnant minors seeking to terminate and those seeking to carry to term" and further held that the law's "discriminatory barrier to those minors seeking to exercise their fundamental privacy right to terminate a pregnancy violates Alaska's equal protection guarantee." Finally, the Court held that "because the Notification Law cannot stand in the face of the Alaska Constitution's equal protection guarantee, it is unnecessary to decide—and it is not decided—

whether invalidation of those provisions on the constitutional privacy ground renders the Notification Law unenforceable in its entirety."

Planned Parenthood of the Great Northwest v. State, 375 P.3d 1122 (Alaska 2016).

Legislative action is recommended in light of the Alaska Supreme Court's ruling that the Parental Notification law is unconstitutional and cannot be enforced.

Art. I, sec. 14, Constitution of the State of Alaska, AMC 09.28.026

SEIZURE OF VEHICLES PURSUANT TO AN ARREST FOR A SPECIFIED OFFENSE IS NOT PERMISSIBLE UNDER THE "COMMUNITY CARETAKER" RATIONALE.

Anchorage Municipal Code (AMC) 09.28.026 gives police officers authority, at their discretion, and without a court order, to impound the motor vehicle of any person who is arrested for, or charged with, one of six specified offenses, including driving while under the influence. Taha was arrested by the Anchorage police for driving under the influence and his vehicle was seized pursuant to AMC 09.28.026, even though Taha asked that a passenger or his father drive his car home. A search revealed drug paraphernalia and a gun. Taha was convicted of a drug offense, DUI, and misconduct involving a weapon. Taha appealed arguing that the seizure of his vehicle was illegal under art. I, sec. 14 of the Alaska Constitution. The state justified the seizure under the "community caretaker" function. The community caretaker doctrine refers to the authority of the police (or other government agents) to seize and remove vehicles from the streets when they impede traffic or otherwise threaten public safety or convenience. The Court of Appeals determined that the seizure and impoundment authorized by AMC 09.28.026 is not aimed at, or limited to, vehicles that might be impounded under a community caretaker rationale. Under the ordinance, it is irrelevant whether the impounded vehicle was impeding traffic or posed any other threat to public safety or convenience, or whether the vehicle or its contents were at risk of theft or vandalism. The impoundment instead hinges on whether there is probable cause to believe that the driver committed one of the six specified offenses. The Court of Appeals also analyzed whether the ordinance could be saved through a limiting construction by narrowing the operation of the ordinance. The Court determined that while police may impound vehicles

under a community caretaker rationale, the impoundments are only lawful if they are conducted under the authority of, and in conformity with, governing regulations or police department policies, and that those regulations or policies are reasonably related to the proper exercise of the community caretaker function. However, under the Anchorage ordinance, the police are given broad discretion to impound vehicles simply because the police have reason to believe that the vehicle was involved in one of the six enumerated offenses, regardless of whether there is any community caretaker need to move or secure the vehicle or other constitutional justification. The Court of Appeals therefore remanded the case and noted it was possible that the search and seizure of the vehicle might be justified under other rationales.

Taha v. State of Alaska, 366 P.3d 544 (Alaska App. 2016).

Legislative review is not recommended.

Art. II, sec. 5, Constitution of the State of Alaska, AS 31.25.020

IT IS UNCONSTITUTIONAL FOR LEGISLATORS TO SERVE ON SELECT BOARDS AND COMMISSIONS, REGARDLESS OF VOTING STATUS.

The governor asked for an opinion on the constitutionality of legislators serving on executive branch boards and commissions, either as voting or non-voting members. The question was based, in part, on passage of HCS CSSB 125(RES), 29th Alaska State Legislature, which would have made three sitting legislators directors of the Alaska Gasline Development Corporation (AGDC).

In construing art. II, sec. 5, Constitution of the State of Alaska, which provides that "[n]o legislator may hold any other office or position of profit under the United States or the State . . .", Alaska Supreme Court opinions on the issue, and the Department of Law's (department) prior opinions on the issue, the department ultimately opined "that having legislators serve as non-voting directors of AGDC violates the prohibition against dual office holding and the separation of powers doctrine." The department reasoned that not only is the difficulty with conflicts of interest particularly acute, but "[a] director of AGDC, even a non-voting one, holds an 'office' of the State within the meaning of article II, sec. 5 of the Alaska Constitution." The department also concluded that having legislators serve as AGDC directors violated the separation of powers doctrine, as "[t]he appointment of the legislators to

AGDC's board by the presiding officers of the house and senate in and of itself would contravene the governor's exclusive authority to appoint subordinate executive officials." For similar reasons, the department also opined "that having legislators serve as non-voting directors of the Alaska Aerospace Corporation (AAC) and the Knik Arm Bridge and Toll Authority (KABATA) is unconstitutional. Legislators serving on the board of the Alaska Seafood Marketing Institute (ASMI) is likely unconstitutional, . . . [and] the constitution prohibits legislators from serving as members of the Alaska Commission on Postsecondary Education (ACPE)."

Nevertheless, the department noted that "the constitution is not offended by having legislators serve on boards and commissions that can only 'inquire and advise.'" Therefore, the department concluded that it is "unlikely that having legislators serve on [the following] boards, commissions, committees and councils contravenes the Alaska constitution":

(1) the Alaska Criminal Justice Commission;
(2) the Alaska Health Care Commission;
(3) the Alaska Native Language Preservation and Advisory Council;
(4) the Alaska Tourism Marketing Board;
(5) the bond reimbursement and grant review committee of the Department of Education and Early Development;
(6) the Citizens' Advisory Commission on Federal Management Areas in Alaska;
(7) the advisory committee on bail for state park offenses;
(8) the advisory committee of the Alaska Energy Authority on rural energy grants; and
(9) the Statewide Suicide Prevention Council.

2016 Op. Att'y Gen. (July 19); File No. AN2016101165).

Legislative review is recommended to determine whether statutory provisions allowing, either explicitly or implicitly, for appointment of legislators to certain boards and commissions (particularly AGDC, AAC, KABATA, ASMI and ACPE), should be revised.

Art. II, sec. 15, Art. IX, sec. 7, and Art. IX, sec. 13, Constitution of the State of Alaska, AS 14.17.410

REQUIRED LOCAL GOVERNMENT CONTRIBUTION UNDER THE STATE'S EDUCATION FUNDING FORMULA IS CONSTITUTIONAL.

The Ketchikan Gateway Borough made its required local contribution under the state's education funding formula "under protest," then filed suit against the state, alleging that the required local contribution was unconstitutional. The superior court partially granted the borough's motion for summary judgment in the case, holding that the local contribution violated the dedicated funds clause under art. IX, sec. 7, Constitution of the State of Alaska. In this regard, the superior court concluded that the required local contribution constituted the proceeds of a state tax or license and that the local contribution statute earmarked those funds for a specific purpose, thus depriving the legislature from using the funds in any other manner. However, the superior court found that the required local contribution did not violate the appropriations or governor's veto clauses of the Constitution of the State of Alaska, under art. IX, sec. 13 and art. II, sec. 15, respectively. Finally, the superior court denied the borough a refund, holding that the state was not unjustly enriched from the contribution.

All parties appealed to the Alaska Supreme Court, and the Court overturned the superior court decision, finding that the existing education funding formula did not violate the Constitution of the State of Alaska. The Court held that the required local contribution was not a "state tax or license" within the meaning of the dedicated funds clause, reasoning that pre-statehood local communities and the territory supported local schools together and "[t]hough the delegates sought to limit certain powers and to avoid certain pitfalls, they did not intend to compel the State to unravel existing programs . . . ." The Court further explained that this was the first time the Court had been asked to decide whether local contributions to longstanding cooperative programs run afoul of the dedicated funds clause, but that "[t]he minutes of the constitutional convention and the historical context of those proceedings reveal that the delegates did not intend for required local contributions to such programs to be included in the term 'state tax or license.'" The Court did agree with the superior court that the required local contribution did not violate the appropriations clause or the governor's veto clause. Because the required local contribution was deemed constitutional, the Court held that the borough was not entitled to a refund of its local contribution.

State v. Ketchikan Gateway Borough, 366 P.3d 86 (Alaska 2016).

Legislative review is not recommended.

Art. IX, secs. 1 and 4, Constitution of the State of Alaska

THE POWER OF TAXATION CANNOT BE SURRENDERED BY AN IRREVOCABLE LEGISLATIVE TAX STRUCTURE OR CONTRACT.

The Department of Law (DOL) determined that the Alaska Constitution prohibits the state from binding itself to a tax structure for a proposed Alaska North Slope liquefied natural gas project and preventing future legislatures from amending that tax structure.

Although federal case law recognizes that one of the powers a state may contractually limit is the power to tax under the federal constitution's contract clause, many states, including Alaska, adopted constitutional provisions that prevent the surrender of state taxing power. Art. IX, sec. 1, Constitution of the State of Alaska, states: "The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article." Art. IX, sec. 4, Constitution of the State of Alaska, allows tax exemptions to the state and its political subdivisions, and for nonprofit religious, charitable, cemetery, or educational purposes, as well as "[o]ther exemptions of like or different kind [. . .] *by general law*." DOL advised that sections 1 and 4, read together, allow the legislature to suspend or contract away its taxation power by general law, but not to permanently or irrevocably surrender the power to tax. DOL noted that interpreting art. IX to preclude the legislature from binding its successors' hands is supported by art. I, sec. 15, Constitution of the State of Alaska, which prohibits laws that make an irrevocable grant of special privileges or immunities, and the Alaska Supreme Court's rulings that the legislature cannot bind future legislatures. DOL based its conclusion on the plain language and legislative history of art. IX, which allows general law exemptions that, by definition, may be amended or repealed. DOL advised that a 2006 formal attorney general opinion, which endorsed the Stranded Gas Development Act and concluded that the legislature could contract away its sovereign power of taxation for 30 - 45 years, and a 2007 attorney general letter that concluded that a binding 10-year production tax exemption under the Alaska Gasline Inducement Act was constitutionally permissible, are both

opinions that are not supported by the legislative history or text of article IX.

2016 Op. Alaska Att'y Gen. (June 23).

Legislative review is not recommended.

Alaska Appellate Rule 209(b)(6), AS 18.85.120(c)

A DEFENDANT DOES NOT HAVE TO PAY ATTORNEY'S FEES UNDER RULE 209(b)(6), ALASKA RULES OF APPELLATE PROCEDURE, IF THE DEFENDANT'S ATTORNEY PURSUES AN INTERLOCUTORY PETITION FOR REVIEW DURING THE LITIGATION OF THE CASE IN THE TRIAL COURT BEFORE THE TRIAL COURT HAS ENTERED A FINAL JUDGMENT IN THE CASE.

Alexiadis reached a plea agreement with the state, but the superior court rejected the plea agreement as it was too lenient because the state had agreed not to pursue aggravating factors. Alexiadis petitioned the Alaska Court of Appeals to review and reverse the superior court's rejection of the plea agreement. The court ruled that the superior court lacked the authority to order the state to pursue aggravating factors if those factors would require a jury trial. After the decision, the Clerk of the Appellate Courts notified Alexiadis that she intended to enter judgment against him for attorney's fees in the amount of $1000. Rule 209(b)(6), Alaska Rules of Appellate Procedure, established a schedule of fees that indigent defendants must pay toward the cost of their court-appointed attorney if the defendant pursues various specified types of appellate litigation. Rule 209(b)(6) sets the fee for "other appellate actions" at $1000. Alexiadis argued, however, that AS 18.85.120, the statute that the Appellate Rule is based on, and which authorizes the state to enter judgment against indigent defendants for a portion of the cost of their court-appointed counsel, only applies to defendants who have been convicted of a crime. The court noted that the attorney's fees schedules do not take into account the amount of work or time a court-appointed defense attorney might spend on a case, and the decision to file an interlocutory petition for review is one aspect of litigating the case. Therefore, the Court of Appeals determined that indigent defendants should not pay an additional attorney's fee if the court-appointed attorney or law firm who is representing them in the trial court chooses to pursue an interlocutory petition for review in the middle of the trial court proceedings.

Alexiadis v. State, 355 P.3d 570 (Alaska App. 2016).

Legislative review is not recommended unless the legislature wants defendants to pay attorney's fees to a court-appointed attorney for an interlocutory appeal before conviction.

Alaska Civil Rule 15(c)

RULE 15(c), ALASKA RULES OF CIVIL PROCEDURE, ALLOWS A PLAINTIFF TO ADD A PARTY TO A LAWSUIT, NOT JUST SUBSTITUTE A PARTY.

Several men were in a car that rear-ended the plaintiff's vehicle. The plaintiff sued the car's owner, believing he had been driving. The car's owner moved to dismiss the lawsuit on the basis of an affidavit from a second man, who claimed he was driving at the time of the accident. The plaintiff amended her complaint to name both men. Alaska Civil Rule 15(c) allows a change of party to relate back to the original filing in certain circumstances. The second man moved to dismiss the claim against him, arguing that under Rule 15(c) a change of party required substitution, not addition, of a party and the claim was barred by the statute of limitations. The district court agreed and dismissed the claim. The plaintiff proceeded to trial against the car's owner, who defended on grounds that he had not been driving. The jury found against the plaintiff. On appeal, the Supreme Court determined that "changing the party against whom a claim is asserted" for purposes of relation back under Rule 15(c) includes both adding and substituting defendants. The Court noted that an important purpose of Rule 15(c) is to ensure that a new party has fair notice of a cause of action within the time provided by the statute of limitations and that limiting the rule's application to substitutions of parties could harm the plaintiff who made an honest mistake. Therefore, the Court concluded that under Rule 15(c), adding a defendant is "changing the party against whom the claim is asserted."

Sellers v. Kurdilla, 377 P.3d 1 (Alaska 2016).

Legislative review is not recommended.

Alaska Criminal Rule 45

IF A TRIAL COURT DISMISSES CRIMINAL CHARGES ON ITS OWN MOTION, THE TIME FOR TRIAL BEGINS RUNNING FROM THE DATE OF SERVICE OF THE SECOND CHARGE.

Andreanoff was arrested and charged with misdemeanor driving while under the influence and driving with a suspended license. At Andreanoff's arraignment, the charges were dismissed without prejudice by the court on its own motion because the prosecutor failed to provide sworn testimony or an affidavit from the arresting officer. A week later, the state refiled the charges, but it was more than two months before the state was able to serve Andreanoff with the refiled charges. Shortly before the trial was to begin, Andreanoff's attorney asserted that the speedy trial time under Rule 45 had expired. The charges were dismissed and the state appealed. The Court of Appeals determined that in most circumstances, a court's *sua sponte* dismissal of criminal charges will benefit the defendant and will function similarly to a dismissal upon motion of the defendant for purposes of Rule 45. The court did not determine what would happen if the court dismissed criminal charges if the defendant were to object to the court's dismissal. However, if the defendant does not object to the dismissal, the court concluded that the Rule 45 time begins on the date the defendant is served with the refiled charges.

State v. Andreanoff, 370 P.3d 1112 (Alaska App. 2016).

Legislative review is not recommended.

Alaska Delinquency Rule 21(a)

REQUIREMENT OF 20 DAYS' NOTICE FOR REQUESTING A JURY TRIAL IS CALCULATED BASED ON THE TRIAL CALL DATE FOR A DELINQUENCY CASE.

After the superior court set a delinquency case for trial call, the juvenile's attorney requested a jury trial. The superior court denied this request as untimely because under Alaska Delinquency Rule 21(a), "the juvenile must request a jury trial no later than 20 days before any scheduled trial date" unless there is good reason.

On appeal, the Alaska Court of Appeals rejected the argument that when a delinquency case is included among a group of cases at a trial call, the phrase "scheduled trial date" refers to the specific trial date that the court later establishes. The court

explained that in Alaska, most delinquency cases are not given a specific trial date until just before they are actually tried. Instead, a case is scheduled, along with other cases, for a trial call to determine which cases are ready and the order in which they will be tried. The court held that the 20 days' advance notice requirement for requesting a jury trial should be calculated based on the trial call date, not on the specific trial date later set by the court. The court reasoned that to interpret the rule otherwise would undermine the 20 days' notice requirement for all delinquency cases scheduled for a trial call and noted that the Alaska Supreme Court established the rule only after checking with area court administrators to ensure it would allow adequate time.

M.H. v. State, 382 P.3d 1201 (Alaska App. 2016).

Legislative review is not recommended unless the legislature wishes to change the meaning of "scheduled trial date."

Alaska Rules of Evidence 803(3) and 804(b)(5)

A HEARSAY STATEMENT BY A DECEASED VICTIM SHOULD HAVE BEEN ADMITTED UNDER EVIDENCE RULE 803(3) AND 804(b)(5), WHICH ALLOW EXTRINSIC CORROBORATING EVIDENCE TO BE CONSIDERED.

A criminal defendant appealed convictions for two murders committed after he was assaulted by one of the victims. At trial, the defendant sought to admit a recording of a phone call to police placed by a woman, Carmela Bacod, who had since died, that corroborated his defense. On the recording, Bacod told a police officer that one of the victims told Bacod both victims were conspiring to attack and rob the defendant. In support of his motion to admit the recording, the defendant contended the recording was critical to his defense, which centered on self-defense and heat of passion. He invoked Alaska Rule of Evidence 803(3), which is the state of mind hearsay exception, and Rule 804(b)(5), which is the unavailable declarant residual hearsay exception. The superior court denied the motion. The jury, presented with no evidence of a conspiracy to attack and rob the defendant, convicted him.

On appeal, the Alaska Supreme Court found that Bacod's statement should have been admitted at trial, reversed the defendant's convictions, and remanded for a new trial. The Court held that, under Alaska Rule of Evidence 803(3), the victim's statement to Bacod was admissible to show both

victims' intent and conduct because it met Rule 803(3) requirements and the statement had "equivalent circumstantial guarantees of trustworthiness" to listed hearsay exceptions. The Court noted that a defendant's right to present a defense is a fundamental element of due process and exclusion of the statement prevented the jury from hearing the only available evidence of the reason one of the victims, Moore, would have attacked the defendant. In addition, the state likely could have used Moore's statement against Moore if he was prosecuted for conspiracy to rob, and the statement did not become less trustworthy because the defendant, rather than the state, sought to introduce it. The Court held that the statement by Moore's alleged co-conspirator provided the only reasonably available evidence explaining Moore's alleged assault on the defendant. The Court also found Bacod's statement was admissible under Alaska Rule of Evidence 804(b)(5). Although the superior court and Alaska Court of Appeals found Bacod's statement did not fall within Rule 804(b)(5) because it was not "so trustworthy that adversarial testing would add little to its reliability," the Court found that this approach, which was borrowed from Confrontation Clause cases, was inapplicable because the state is not protected by the Confrontation Clauses of the Alaska and United States Constitutions. Instead, the Court found that the test set out in Rule 804(b)(5) should have been used. The Court also found that there is no logical reason that extrinsic corroborating evidence cannot contribute to creating "circumstantial guarantees of trustworthiness" equivalent to other unavailable declarant hearsay exceptions.

Sanders v. State, 364 P.3d 412 (Alaska 2015).

Legislative review is not recommended.

AS 09.10.050,
AS 09.10.070(a),
AS 46.03.822

ENVIRONMENTAL CONTAMINATION CLAIMS BASED ON TRESPASS SUBJECT TO SIX-YEAR STATUTE OF LIMITATIONS; CONTRACTUAL INDEMNITY CLAIM ACCRUES ON REFUSAL.

Williams Alaska Petroleum owned the North Pole refinery until 2004. Flint Hills Resources Alaska bought the North Pole refinery from Williams in 2004 pursuant to a contract that contained detailed terms regarding environmental liabilities, indemnification, and damages caps. Almost immediately after the sale of the refinery, the Alaska Department of Environmental Conservation (DEC) informed Flint Hills that sulfolane was to be a regulated chemical and that Flint Hills

needed to find the source of sulfolane in the groundwater on the refinery's property. In 2008 Flint Hills discovered that sulfolane was migrating beyond its property and had contaminated drinking water in North Pole. A North Pole resident sued Flint Hills and Williams, and Flint Hills cross-claimed against Williams for indemnification. After extensive motion practice the superior court dismissed all of Flint Hills's claims against Williams as time-barred, including contractual indemnity claims and statutory claims under AS 46.03.822(a). Flint Hills appealed.

The superior court dismissed the contractual indemnity claims, holding that the statute of limitations began to run when damages were incurred and a claim of indemnity could have been made. In a case of first impression, however, the Alaska Supreme Court held that a pure contractual indemnity claim accrues when indemnity is refused, not when a claim could have been made, reversing the superior court decision.

The superior court also dismissed the claims under AS 46.03.822 as barred by the two-year limitation for statutory claims. On appeal, Flint Hills argued that the six-year limitations period for trespass under AS 09.10.050 was more appropriate than the two-year limitations period imposed by the superior court under AS 09.10.070(a). Ultimately, the Alaska Supreme Court agreed with the superior court that Flint Hills's strict liability statutory claim is time-barred by the two-year statute of limitations under AS 09.10.070(a) with respect to sulfolane contamination on the refinery property. However, it held that Flint Hills's potential liability to owners of properties *beyond the refinery's boundaries* was subject to the six-year statute of limitations for trespass claims under AS 09.10.050. The Court further noted that "[a] claim under AS 46.03.822(a) accrues where a party causes an unpermitted release of a hazardous substance that causes damage. Under the discovery rule, the statute of limitations will not begin to run until a reasonable person has enough information to be on notice for a potential cause of action or to inquire into the extent of the injury."

Flint Hills Res. Alaska, LLC v. Williams Alaska Petroleum, Inc., 377 P.3d 959 (Alaska 2016).

Legislative review is not recommended.

AS 09.45.800

EARTHSLIDE RELIEF ACT IS NOT APPLICABLE TO PROPERTY DISPUTE FOLLOWING 1964 EARTHQUAKE BECAUSE LAND BOUNDARIES DO NOT FLOW WITH SURFACE MATERIAL WHERE THERE IS NO BEDROCK SHIFT OR CARRYING OF ABOVE-GROUND FIXTURES.

Lot owners sued the Municipality of Anchorage seeking relief under the Earthslide Relief Act, challenging the boundary of their property, which was initially subdivided in 1952 with a boundary that stopped south of a bluff that was south of the mean high-tide line of Knik Arm. During the 1964 Earthquake, the bluff flattened out and slid northward into Knik Arm. This created new land and caused existing land to become developable. Although their plats positioned the northern lot boundary at the top of the pre-earthquake bluff, the lot owners asserted their property now extends north to the pre-earthquake mean high-tide line.

The Alaska Supreme Court looked to the deed and affirmed the Superior Court's ruling that the lot owners failed to prove a legal interest in the disputed property. The Court also found that the Earthslide Relief Act did not apply to the property. AS 09.45.800 provides, in part, that "[i]f the boundaries of land [. . .] have been moved by an act of God, consisting of an earthslide, so that they are in a location different from that at which, by solar survey, they were located before the earthslide, an action in rem to recognize the boundaries as they presently exist and to quiet title within the boundaries in the persons judicially found entitled to title [. . .] is authorized." The Court held that the surface shifted in the earthquake, but property boundaries remained in place. The Court reached its conclusion after considering the plain language of the Act and a treatise on boundary law. The Court differentiated this case from one where the earth's surface shifted in the earthslide, carrying with it buildings and trees on the ground above. Instead, in the instant case, the Court noted that the surface material liquefied and flowed north, but the underlying bedrock did not shift, and the surface did not shift carrying buildings and other fixtures onto other properties. Finally, the Court noted that the property's northern boundary lay across the bluff, and the owners of the disputed properties had no interest in the bluff. Therefore, when the bluff slid and flattened out, the owners did not have an interest in the shifted bluff land or the new land created by the earthquake, and their property boundaries remained identifiable.

Fink v. Municipality of Anchorage, 379 P.3d 183 (Alaska 2016).

Legislative review is not recommended, unless the legislature disagrees with the Court's interpretation of the Earthslide Relief Act.

AS 11.16.130

CORPORATE LIABILITY UNDER AS 11.16.130 DOES NOT EXTEND TO A SOLICITATION MADE BY ANY EMPLOYEE.

AB&M Enterprises was convicted of fourth-degree assault based on the conduct of two of its security personnel under the theory that the corporation was responsible for its security personnel's conduct under AS 11.16.130.

Under AS 11.16.130(a)(1), an organization can be convicted of a criminal offense if the offense was committed through the conduct of an agent of the organization, and either (A) the conduct was within the scope of the agent's employment and done "in behalf of the organization" or (B) the conduct was "solicited, subsequently ratified, or subsequently adopted by the organization."

The Alaska Court of Appeals found that jurors were told that a corporation is deemed to have solicited a crime if any officer or employee of the corporation solicited that crime. The court held this is an incorrect statement of law, and reversed AB&M Enterprise's conviction. Instead, the court noted that corporate liability based on the solicitation of a criminal act is typically restricted to instances where the solicitation is made by a director or a "high managerial agent." The court based its ruling on a criminal treatise and the language of AS 11.16.130. Although the statute does not refer to directors, officers, or high-level managers, it states that the solicitation must be made "by the organization." The court held that although it need not decide precisely what amount of managerial authority is required before a person's act of soliciting a crime can be deemed the corporation's act under AS 11.16.130(a)(1)(B), that *any* employee is too broad and noted that the statute implies that the solicitation must instead be "by someone who can reasonably claim some degree of managerial authority or responsibility within the corporation."

AB&M Enterprises, Inc. v. State, 389 P.3d 863 (Alaska App. 2016).

Legislative review is not recommended unless the legislature wishes to clarify which types of employees' solicitation of a criminal act will result in corporate liability.

AS 11.46.482

A PERSON ACTS WITH THE INTENT TO DAMAGE PROPERTY IF THE PERSON ACTS WITHOUT THE OWNER'S PERMISSION, EVEN IF THE PERSON SOUGHT TO "IMPROVE" THE PROPERTY.

Bergman was convicted of third-degree criminal mischief for bulldozing three miles of a wilderness trail located on state and borough land near Fairbanks, widening it into a road that was accessible to motor vehicles. Bergman argued that he did not act with the "intent to damage the property of another" because his intent in bulldozing the trail was not to damage the trail, but to improve the trail. The Court of Appeals rejected this reasoning, and held that the word "damage" in the criminal mischief statute "must be interpreted so as to protect an owner's interest in using or enjoying the property as the owner sees fit -- free from alterations that other people might wish to perform to make the property better." The Court of Appeals upheld Bergman's conviction, stating that even under Bergman's version of events, Bergman intentionally altered the trail without the landowners' permission, and this alteration significantly impaired the landowners' interests.

Bergman v. State, 366 P.3d 542 (Alaska App. 2016).

Legislative review is not recommended.

AS 11.56.380

A PERSON CANNOT BE CONVICTED FOR INTRODUCING CONTRABAND INTO A CORRECTIONAL FACILITY IF THE PERSON IS ALREADY INSIDE A CORRECTIONAL FACILITY.

Hillman was serving a jail sentence at Hiland Mountain Correctional Center. After a visit in the enclosed prison yard with a visitor who came from outside the correctional facility, a strip-search revealed that Hillman had a baggie containing chewing tobacco, a substance prohibited to prisoners. The state charged Hillman with second-degree promoting contraband under AS 11.56.380(a)(1). AS 11.56.380(a) states:

> (a) A person commits the crime of promoting contraband in the second degree if the person

> (1) introduces, takes, conveys, or attempts to introduce, take, or convey contraband into a correctional facility; or
> (2) makes, obtains, possesses, or attempts to make, obtain, or possess anything that person knows to be contraband while under official detention within a correctional facility.

Hillman was convicted and appealed. The Court of Appeals determined that the two paragraphs in AS 11.56.380(a) were meant to apply to two different groups of people. Paragraph (a)(1) was intended to apply to non-incarcerated persons who brought contraband from outside the correctional facility into the facility, while paragraph (a)(2) was intended to apply to incarcerated persons who obtain contraband while they are inside the correctional facility. The Court of Appeals therefore reversed the district court decision because Hillman was charged under (a)(1), which does not apply to her because she was already in the correctional facility.

Hillman v. State, 382 P.3d 1198 (Alaska App. 2016).

Legislative review is not recommended because AS 11.56.380(a)(2) covers this conduct.

AS 11.56.755

A CONVICTION FOR UNLAWFUL CONTACT REQUIRES PROOF THAT THE DEFENDANT WAS NOTIFIED THAT CONTACT WITH THE ALLEGED VICTIM WAS PROHIBITED.

Moran was arrested for assaulting his wife. Later that day, he made seven phone calls to his wife from jail. Moran was subsequently convicted of third-degree assault and second-degree unlawful contact.

AS 11.56.755 states that a defendant commits the crime of unlawful contact if, having been arrested for one of the crimes defined in AS 11.41, or for any other crime of domestic violence, the defendant "initiates communication or attempts to initiate communication with the alleged victim of the crime" before the defendant's initial appearance in front of a judge or magistrate. Moran argued that the statute was unconstitutional because it does not require proof of notice that it would be illegal for the defendant to communicate or attempt to communicate with the victim.

The Court of Appeals noted that while there are legitimate reasons to prevent domestic violence offenders from using a statutorily guaranteed telephone call to harass their victims or try to "beat the charge" by using the phone call to threaten their victims or otherwise induce the victims to falsely recant their accusations, there are also legitimate reasons why an arrestee might want to communicate with the victim. The court stated that the arrestee might want to make sure there are arrangements for children, transportation, rent, or other household matters. The court stated that these types of communications between spouses and domestic partners are protected by constitutional rights of association and privacy, even when one spouse or partner is charged with or convicted of a crime that involves the other. Because the statute was a total ban on all communication, which encompasses innocent or harmless communications, the court concluded that due process requires the government to prove that the defendant was expressly informed of the statute's prohibition on communications with the alleged victim. The court noted that it was expressly not determining whether the statute, as the court construed it to require proof of notification, still constitutes an unconstitutional infringement on the rights of privacy and familial association.

Moran v. State, 380 P.3d 92 (Alaska App. 2016).

Legislative review is recommended.

AS 11.61.140(a)(2)

AS 11.61.140(A)(2) APPLIES ONLY TO PEOPLE WHO HAVE ASSUMED RESPONSIBILITY FOR THE CARE OF AN ANIMAL.

The defendant was convicted of cruelty to animals under AS 11.61.140(a)(2), which declares it a crime if a person, "with criminal negligence, fails to care for an animal" and this failure to provide care leads to the animal's death or causes the animal severe physical pain or prolonged suffering. The defendant appealed her conviction, arguing that a person cannot act "with criminal negligence," unless the person has an applicable duty of care. While the Court of Appeals conceded that the statute fails to specify which persons have a duty to care for particular animals, the Court concluded that it was authorized to look to the common law to remedy this omission. The Court explained that the owners of animals often are the ones who are in charge of providing daily care, but that this was not always true, and the common law "recognizes that a

duty of care can arise by contract or agreement, or by any other voluntary assumption of care." As such, the Court held that AS 11.61.140(a)(2) applies only to people who have assumed responsibility for the care of an animal, either as an owner or otherwise. Because the parties had actively litigated whether the defendant had undertaken personal responsibility for the care of the animals in question, the defendant's conviction was affirmed.

Sickel v. State, 363 P.3d 115 (Alaska App. 2015).

Legislative review is not recommended. In response to this decision, the 29th Alaska State Legislature amended AS 11.61.140(a)(2) to state that a person commits cruelty to animals if the person "has a legal duty to care for the animal and, with criminal negligence, fails to care for an animal and, as a result, causes the death of the animal or causes severe physical pain or prolonged suffering to the animal."

AS 11.61.220

IT REMAINS UNCLEAR WHETHER A WEAPON WITHIN DIRECT REACH OF A PERSON CONSTITUTES "ON THE PERSON."

The plaintiff was in a vehicle parked in a vacant lot when approached by an officer. At the time of the stop, it is undisputed that the plaintiff had several weapons in the vehicle, but did not have any weapons physically attached to his person. The plaintiff did not notify the officer about any weapons at the time of the stop. The officer subsequently placed the plaintiff in his police vehicle and arrested him for violating AS 11.61.220(a)(1)(A), misconduct involving weapons in the fifth degree. That provision makes it a crime when a person contacted by a peace officer fails to immediately inform the peace officer of a deadly weapon "that is concealed on the person." The charges against the plaintiff were subsequently dismissed.

The plaintiff later asserted claims under 42 U.S.C. § 1983 for his arrest, and state law tort claims of false arrest/imprisonment and intentional infliction of emotional distress. After filing motions for summary judgment, the United States District Court granted summary judgment to the defendants and held that even if AS 11.61.220(a)(1)(A) - the statute under which the officer had the plaintiff arrested - did not provide probable cause for arrest, Anchorage Municipal Ordinance 8.25.020 did.

The plaintiff appealed, and the Ninth Circuit disagreed with the United States District Court's interpretation of the ordinance, but "remanded with instructions to consider whether, pursuant to the United States Supreme Court's recent decision in *Heien v. North Carolina*, the arrest was lawful, and, if not, whether [the officer was] entitled to qualified immunity." In *Heien,* the Court held that "the Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes — whether of fact or law — must be *objectively* reasonable."

On remand, in applying *Heien,* the United States District Court noted -- and ultimately did not resolve -- that there "is an open question whether an officer may make a 'reasonable mistake of law' as to a statute that the officer did not rely upon to find probable cause. . . . [I]t is unclear whether an arresting officer may make an objectively reasonable mistake of law about a law upon which he did not rely when arresting the suspect." The United States District Court also raised, but did not resolve, the issue of whether a concealed weapon within reach in an automobile is 'on the person' under AS 11.61.220. Ultimately, however, the United States District Court held that the officer was "entitled to qualified immunity because the contours of state and local law were not sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Dunlap v. Anchorage Police Dep't, 2016 WL 900625 (D. Alaska Mar. 8, 2016).

Legislative review is recommended to clarify whether a weapon within direct reach of a person constitutes "on the person" under AS 11.61.220.

AS 11.71.040(a),
AS 11.81.600(b),
AS 11.81.610(b)

FOR A POSSESSION CONVICTION, DUE PROCESS REQUIRES THAT THE STATE PROVE A DEFENDANT ACTED AT LEAST NEGLIGENTLY REGARDING THE AMOUNT OF MARIJUANA POSSESSED IN THE DEFENDANT'S HOME.

Defendants in two appeals were convicted of possessing more than four ounces of marijuana in violation of AS 11.71.040(a)(3)(F). One defendant had 15 plants in his house, which, once harvested, weighed over a pound and a half; the jury in his case received no instruction on culpable mental state regarding the weight of the marijuana. According

to testimony at the trial of the other defendant police found plants at his residence that would have yielded over two pounds of usable marijuana and processed marijuana that weighed 1.88 pounds; the jury in his case was instructed it was irrelevant whether he might have reasonably believed his marijuana weighed less than four ounces.

The court found juries in both cases should have been instructed that reasonable mistake as to the weight of the marijuana was a defense given that possession of less than four ounces of marijuana in one's home for personal use is protected under the state constitution. The court found that AS 11.71.040(a)(3)(F) does not reference culpable mental states and the default culpable mental state of "recklessly" under AS 11.81.610(b) would not apply because the legislative history of AS 11.71 demonstrated legislative intent to dispense with proof of culpable mental states regarding the amount of a controlled substance in a defendant's possession. However, the court held that strict liability as to whether marijuana amounts to at least four ounces would be an unconstitutional violation of privacy where a defendant is charged with possession of marijuana in his or her home. Instead, the court found due process requires that the state prove a defendant acted at least negligently regarding the circumstance that the marijuana weighed four ounces or more. The court found, however, that this error was harmless in both defendants' cases given the large amount of marijuana found in each of their residences, and affirmed their convictions.

Jordan v. State, 367 P.3d 41 (Alaska App. 2016).

Legislative review is not recommended.

AS 11.81.600(a),
AS 12.47.020,
AS 12.47.070

COURT MUST ALLOW DEFENDANT WHO HAD A BRAIN ANEURYSM TO MAKE A FULL OFFER OF PROOF FOR AN INVOLUNTARINESS DEFENSE.

William E. Palmer was convicted of third-degree assault after an armed stand-off with state troopers at his home. Before being taken into custody, it was discovered he was suffering from a ruptured brain aneurysm. He received emergency surgery and was later found competent to stand trial, although he lacked memory of his arrest. Palmer raised the issue as proof of the involuntariness of his actions. AS 11.81.600(a) provides that voluntariness is a necessary element for criminal liability.

Before trial, the state requested that the superior court preclude mention of Palmer's aneurysm at trial unless he complied with the procedural requirements for a defense of insanity or diminished capacity based on "mental disease or defect." These requirements include written pretrial notice and submission to court-ordered psychiatric or psychological examinations under AS 12.47.020 and AS 12.47.070. Rather than having Palmer undergo the psychiatric examinations, his attorney withdrew the involuntariness defense, and the court granted the state's motion. At trial, the jury did not hear evidence of Palmer's brain aneurysm. At sentencing, the court found Palmer had been suffering from a "mental defect." Palmer appealed, arguing the court erred when it ordered him to submit to psychiatric examinations as a precondition to asserting an involuntariness defense.

On appeal, the Alaska Court of Appeals found that the superior court acted prematurely when it ordered Palmer to waive his constitutional rights and submit to unwanted psychiatric examinations before the court fully understood his involuntariness defense. The Alaska Court of Appeals therefore remanded the case to give Palmer an opportunity to make a full offer of proof of his defense.

The Alaska Court of Appeals based its decision on distinctions between the defense of diminished capacity and an involuntariness defense. A defense of involuntariness challenges the state's proof of the voluntariness of the defendant's act, rather than the defendant's mental state. Thus, when a defendant raises reasonable doubt that his actions were voluntary, the defendant is entitled to a jury instruction on this defense and the state must prove the element of voluntariness beyond a reasonable doubt. The Alaska Court of Appeals noted that Alaska courts have not addressed the variety of conditions that can lead to a claim of involuntariness.

Palmer v. State, 379 P.3d 981 (Alaska App. 2016).

Legislative review is not recommended

AS 12.30.040(b)(3)

THE TEN-YEAR LOOK-BACK PERIOD IN AS 12.30.040(b)(3) IS CALCULATED FROM THE DATE OF THE DEFENDANT'S CONVICTION OF A CLASS B FELONY AND NOT FROM THE DATE OF THE MOTION FOR BAIL RELEASE.

Bowlin was convicted of second-degree assault, a class B felony. Bowlin appealed his conviction and asked the superior court to release him on bail pending resolution of the appeal. The superior court denied the request for a bail hearing, concluding that Bowlin was ineligible for bail release under AS 12.30.040(b)(3) because he had a prior felony conviction within ten years of his conviction in the present case. Bowlin argued that the ten-year look-back period should start when he filed the motion for bail release, and not from the date of the conviction of a class B felony. The Court of Appeals noted that the legislature did not specify what it meant by "convicted within the previous 10 years" but the legislative history demonstrates that the legislature's purpose in revising AS 12.30.040(b)(3) was to protect victims and the public from defendants who demonstrated a certain level of dangerousness, while protecting the right of other less dangerous offenders to bail release. The Court of Appeals therefore concluded that the ten-year period starts from the time of conviction of the class B felony.

Bowlin v. State, 366 P.3d 534 (Alaska App. 2016).

Legislative review is not recommended unless the legislature wants to clarify when the ten-year look-back period begins.

AS 12.55.039

ONLY ONE POLICE TRAINING SURCHARGE SHOULD BE ASSESSED IN ANY ONE CRIMINAL CASE.

The defendant was found guilty of more than 100 counts of possessing child pornography. The superior court then assessed a separate "police training" surcharge for each of the defendant's 116 convictions. The defendant appealed.

AS 12.55.039(a)(1) provides that when a defendant is convicted of a felony, the court must order that the defendant pay a $100 "surcharge". AS 12.55.039(a)(2)-(3) similarly provide for surcharges upon conviction of misdemeanors. The parties referred to these surcharges as "police training surcharges" because the legislature is authorized to appropriate

an amount equal to the income collected from the surcharges to statewide police training. On appeal, the state argued "that if the legislature had wanted to impose only one surcharge under AS 12.55.039, no matter how many convictions were entered against a defendant, the legislature easily could have worded AS 12.55.039 the way it worded AS 12.55.041." AS 12.55.041, unlike AS 12.55.039 provides for a "single surcharge . . . on a defendant." The Alaska Court of Appeals held, however, that there is no "connection between the number of counts that any particular defendant is convicted of and any increased need for law enforcement training. Consequently, the court held that "only one surcharge should be imposed under AS 12.55.039 in any one criminal case."

Miller v. State, 382 P.3d 1192 (Alaska App. 2016).

Legislative review is recommended to determine whether it is the legislature's intent that only one surcharge be imposed under AS 12.55.039 in any one criminal case.

AS 13.26.131,
AS 44.21.415

FEE SHIFTING PROVISION APPLICABLE TO GUARDIANSHIPS DOES NOT APPLY TO ELDER FRAUD PROCEEDINGS.

The State Office of Public Advocacy (OPA) filed a petition for a protective order on behalf of an elderly woman against her daughter, who was her caregiver. The superior court denied the protective order. OPA then participated in a conservatorship proceeding initiated by the elderly woman's other daughter. The elderly woman's estate and the caregiver daughter sought attorney's fees against the state for the protective order and conservatorship proceedings. The superior court awarded fees arising from the protective order, finding OPA's petition without "just cause," but denied attorney's fees for the conservatorship proceeding because the state did not initiate the proceeding as required under AS 13.26.131(d).

The Alaska Supreme Court found AS 13.26.131(d), which provides for fee shifting in guardianship proceedings that are "malicious, frivolous, or without just cause," inapplicable to elder fraud protective order proceedings. The Court had previously held this provision applies to conservatorship proceedings and guardianship proceedings. However, the Court found AS 13.26.131(d) and Alaska Civil Rule 82 inapplicable to elder fraud protective order proceedings

because such proceedings are subject to AS 44.21.415. Although the plain text of AS 13.26.131(d) indicates it applies to all proceedings "under this chapter," the Court found other sections of AS 13.26.131 evidence legislative intent that the statute not apply to elder fraud proceedings. In allocating costs between the state and the respondent, the use of the word "respondent" in a protective order proceeding would lead to absurd results since the "respondent" is the person accused of fraud and the purpose of the statute is to protect fraud victims. The Court found AS 44.21.415, which is expressly applicable to elder fraud protective order proceedings, does not allow private parties to recover attorney's fees against the state. The Court based its conclusion on legislative history, which focused on reducing OPA's costs and the use of such a one-way cost-recovery mechanism in other states and other areas of Alaska law. The Court also held that because AS 44.21.415 applies to elder fraud protective order proceedings, it displaces Civil Rule 82. The Court therefore vacated the superior court's fee award against OPA in the protective order proceeding.

The Court found AS 13.26.131(d) did apply to the conservatorship proceeding. However, because AS 13.26.131(d) only allows a fee award against a party who *initiates* a proceeding and the state did not *initiate* the conservatorship proceeding but only later participated, the Court affirmed denial of fees for the conservatorship proceeding.

State, Office of Pub. Advocacy v. Estate of Jean R., 371 P.3d 614 (Alaska 2016).

Legislative review is not recommended unless the legislature intended to allow fees to be assessed against the state in unsuccessful elder fraud protective order proceedings or in a conservatorship proceeding not initiated by the state.

AS 15.13.400

CORPORATE CONTRIBUTIONS TO CANDIDATES EXCLUDE SERVICES PROVIDED AT A "COMMERCIALLY REASONABLE RATE" BASED ON AGENCY INTERPRETATION, NOT MERELY ADDITIONAL COST TO CORPORATION.

The Alaska Public Offices Commission (APOC) determined that RBG Bush Planes, in charging two candidates for the Lake and Peninsula Borough Assembly a fraction of the fuel costs associated with flights throughout the borough, did not

charge a commercially reasonable rate, and fined RBG Bush Planes $25,000 for making illegal corporate contributions to the candidates. The Alaska Supreme Court affirmed the superior court's decision, which upheld APOC's decision.

"Contribution" is defined in AS 15.13.400. At issue in this case were two definitions previously contained in former 2 AAC 50.250 that excluded a service provided to a candidate at a "commercially reasonable rate." On appeal, RBG Bush Planes argued the phrase "commercially reasonable rate" was ambiguous and APOC should have therefore deferred to RBG Bush Planes' methodology for charging for actual costs. The Court found that the phrase, while not ambiguous in the abstract, became ambiguous because of a 2006 APOC advisory opinion that raised the possibility of using actual costs in determining a "commercially reasonable rate." The Court found, however, that because actual costs do not account for profit margin and change the regulation's focus from a market-based analysis to the costs specific to an individual service provider, the advisory opinion inserted ambiguity into the regulation's meaning. The Court therefore interpreted the regulation in RBG Bush Planes' favor, but found RBG Bush Planes' interpretation strained. The Court reasoned that RBG Bush Planes' interpretation of "actual cost" as only those additional costs for fuel and minor incidentals incurred because of the candidates' presence on its flights left out fixed costs that other companies incorporate into fares, such as for pilots or hanger fees. The Court noted that RBG Bush Planes' interpretation ignored the rationale for the regulation, which is to level the playing field for candidates. APOC was therefore not required to defer to RBG Bush Planes' interpretation and could enforce its own reasonable interpretation of "commercially reasonable rate."

RBG Bush Planes, LLC v. Alaska Pub. Offices Comm'n, 361 P.3d 886 (Alaska 2015).

Legislative review is not recommended.

AS 17.38.020,
AS 17.38.040,
3 AAC 306.990

CONSUMPTION OF MARIJUANA AT MARIJUANA CLUBS VIOLATES THE PROHIBITION ON CONSUMPTION OF MARIJUANA IN PUBLIC.

Marijuana social clubs, a venue where guests are invited to consume marijuana and marijuana products for an entry or membership fee, began to operate not long after the ballot

measure legalizing marijuana passed. These venues were not retail marijuana stores or licensed by the Marijuana Control Board. Because AS 17.38.040 prohibits consuming marijuana in public, the attorney general concluded that consumption of marijuana at these clubs is illegal. While the statutes do not define "public" for purposes of AS 17.38.040, the Marijuana Control Board adopted a regulation to define "in public" as "a place to which the public or a substantial group of people has access" that includes places of amusement or business. 3 AAC 306.990. The regulation excludes areas on the premises of a licensed retail marijuana store designated for onsite consumption. The attorney general concluded that a marijuana club is a place of business if it is operated for a financial benefit. If not operated as a business it would be unlawful if a substantial number of people have access to it.

The attorney general also noted that many marijuana clubs advertise free samples of marijuana and marijuana products to patrons who pay an admission or membership fee, and determined that if the venue is unlicensed, it is subject to the limits on marijuana possession and the laws against unlawful delivery of marijuana. A proprietor of a marijuana club may neither possess more than one ounce of marijuana nor transfer any amount of marijuana to patrons for remuneration under AS 17.38.020. The attorney general stated that the admission or membership fee could be construed as remuneration in violation of the statute, even though the samples are labeled as free.

2016 Op. Alaska Att'y Gen. (Aug. 31); File No. AN2016101562.

Legislative review is recommended to determine if the legislature wishes to redefine "public" for the purposes of licensing or otherwise permitting marijuana clubs.

AS 18.66.100

THE COURT MAY DENY ATTORNEY'S FEES UNDER AS 18.66.100 TO A SUCCESSFUL PETITIONER ONLY IN EXCEPTIONAL CIRCUMSTANCES.

Lee-Magana filed a petition for a protective order against Carpenter. A long-term protective order was subsequently granted by the superior court judge assigned to the parties' custody dispute. After the hearing, Lee-Magana filed a motion for an award of $1,000 in reasonable actual attorney's fees pursuant to AS 18.66.100(c). A few weeks after Lee-Magana

filed her petition for a long-term domestic violence protective order against Carpenter, Carpenter filed a petition for both short-term and long-term orders against Lee-Magana. Carpenter was denied the short-term order. Lee-Magana moved for attorney's fees on this petition too, again seeking $1,000. The court noted that AS 18.66.100(c) only allows for costs to a petitioner bringing the action, not the respondent, regardless of whether the respondent successfully defended against the petition. The Court determined that for Lee-Magana's petition, she should have been awarded attorney's fees. Although AS 18.66.100(c) uses the word "may" and thus the awarding of attorney's fees is not mandatory, the Supreme Court determined that it should be an exceptional case in which a court fails to grant what the statute allows.

Lee-Magana v. Carpenter, 375 P.3d 60 (Alaska 2016).

Legislative review is recommended only if the legislature wishes to clarify when a party should receive attorney's fees for a domestic violence petition.

AS 21.96.100

INSURANCE POLICY PROVISIONS ENTITLING AN INSURER TO REIMBURSEMENT OF FEES AND COSTS INCURRED IN DEFENDING CLAIMS UNDER A RESERVATION OF RIGHTS UNENFORCEABLE.

A law firm notified its insurer of a lawsuit concerning actions of disbursing from and withdrawing fees and costs against a retainer and alleging damages for, among other things, restitution, disgorgement, and conversion. The insurer accepted the law firm's tender of the defense to the underlying suit, but issued a reservation of rights letter, explaining that the underlying suit contained allegations that did not appear to be professional services within the policy's coverage and asserted that if the policy did not cover the claims, the insurer had the right to be reimbursed for the portion of fees incurred in the defense of claims deemed not covered under the policy.

Under Alaska Appellate Rule 407(a), the Alaska Supreme Court accepted two certified questions of law from the United States Court of Appeals for the Ninth Circuit: First, does Alaska law generally require insurers to pay defense costs, without reimbursement, when they reserve rights? And second, does Alaska law prohibit insurers from seeking reimbursement of fees and costs incurred by defending claims under a

reservation of rights? The Alaska Supreme Court answered yes to both questions.

In response to several earlier decisions by the Court, the Alaska legislature enacted AS 21.96.100, which governs an insurer's duty to defend and the right to defend under a reservation of rights. As the Ninth Circuit noted, however, the statute "does not squarely address whether the insurer can later seek reimbursement of fees assumed under a reservation of rights where the parties agree to a policy that allows reimbursement, and the insurer reiterated the possibility it would seek reimbursement in its reservation of rights letter." Nevertheless, the Court held that "[a] review of the statutory text indicates that reimbursement is prohibited, and because there is no evidence of contrary legislative purpose or intent, we conclude that the state prohibits reimbursement provisions."

Attorneys Liab. Prot. Soc'y, Inc., v. Ingaldson Fitzgerald, P.C., 370 P.3d 1101 (Alaska 2016).

Legislative review is not recommended, unless the legislature disagrees with the Court's conclusion and wants to allow insurers to include provisions in their insurance policies that would permit the insurers to seek reimbursement of fees and costs incurred by defending claims under a reservation of rights.

AS 21.96.100(d)

THE FEDERAL LIABILITY RISK RETENTION ACT PREEMPTS STATE LAW PROHIBITION AGAINST REIMBURSEMENT OF FEES AND COSTS INCURRED BY A LIABILITY INSURER DEFENDING A NON-COVERED CLAIM.

An insurer accepted a law firm's tender of the defense to a law suit concerning actions in disbursing from and withdrawing fees and costs against a retainer and alleging damages for, among other things, restitution, disgorgement, and conversion. The insurance policy at issue expressly excluded from coverage any claims arising from conversion or disputes over fees. The policy also required the law firm to reimburse the insurer for fees and costs that the insurer incurred in defending non-covered claims.

The insurer then filed an action in federal district court seeking a declaration that the insurance policy did not cover the claims

against the law firm and the insurer also sought to recover the expenses it incurred providing a defense to the law firm. The district court determined that the policy did not cover the claims in the underlying law suit. Nevertheless, the district court determined that the insurer was not entitled to reimbursement of the expenses it incurred defending the law firm in the underlying suit, reasoning "that while the policy provided [the insurer] with a right to reimbursement, the reimbursement provision did not comply with Alaska insurance law and was therefore unenforceable." AS 21.96.100(d) provides that in furnishing the insured with independent counsel, an insurer "shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage." The district court therefore determined that "Alaska law prohibits the inclusion of a right to reimbursement in insurance policies in the state and does not allow [the insurer] to provide insurance policy coverage that contradicts that prohibition."

On appeal, the Ninth Circuit Court of Appeals reversed the district court's holding "that [AS] 21.96.100(d)'s prohibition on reimbursement of fees and costs incurred by an insurer defending a non-covered claim offends the [Liability Risk Retention Act (LRRA)]'s broad preemption language and that no exception applies to save the law. The Court reasoned that AS 21.96.100(d) impermissibly conflicts with the LRRA.

Attorneys Liab. Prot. Soc'y, Inc., v. Ingaldson Fitzgerald, P.C., 838 F.3d 976 (9th Cir. 2016).

Legislative review is recommended to determine whether the statute should be amended in light of the Ninth Circuit's determination that the law is preempted by the LRRA.

AS 25.20.140

A CUSTODIAL PARENT SHOULD NOT BE SANCTIONED UNDER AS 25.20.140 IF THE PARENT DENIED VISITATION BECAUSE OF A REASONABLE AND GOOD FAITH BELIEF THAT THE VISITATION WAS NOT IN THE CHILD'S BEST INTEREST.

Susan and Paul, the divorced parents of 4 children, entered into a settlement agreement granting Paul sole legal and physical custody with Susan having supervised visitation. The agreement also allowed Paul to relocate to California with the children. Two months after the settlement agreement, Susan

filed a motion seeking sanctions against Paul under AS 25.20.140 alleging that Paul had "willfully and without just excuse" denied her visitation. Paul confirmed that he had denied Susan visitation, claiming she had repeatedly violated the supervised visitation requirement and he believed she would continue to do so. The superior court denied the motion for sanctions, concluding that Paul had not acted without just excuse because Susan had repeatedly violated the supervision requirement of her visitation with the children.

AS 25.20.140(a) provides for sanctions against a child's custodian when the custodian "willfully and without just excuse" prevents another person from exercising court-ordered visitation with the child. The Supreme Court noted that this statute provides only broad guidance regarding the meaning of "just excuse," merely stating:

> "[J]ust excuse" includes illness of the child which makes it dangerous to the health of the child for visitation to take place in conformance with the court order; "just excuse" does not include the wish of the child not to have visitation with the person entitled to it.

The Court noted there was no legislative history regarding the "without just excuse" standard, and held that a parent will be found to have denied visitation without just excuse when that parent denies visitation on any ground other than a reasonable and good faith belief that denying visitation is in the child's best interest.

Susan M. v. Paul H., 362 P.2d 460 (Alaska 2015).

Legislative review is not recommended unless the legislature would like to clarify the meaning of "just excuse."

AS 25.25.101

TRIBAL COURTS HAVE SUBJECT MATTER JURISDICTION OVER CHILD SUPPORT MATTERS AND THE STATE CHILD SUPPORT ENFORCEMENT AGENCY MUST RECOGNIZE TRIBAL CHILD SUPPORT ORDERS.

The Central Council of Tlingit and Haida Indian Tribes filed action against state, seeking a declaratory judgment that its tribal court system had subject matter jurisdiction over child support matters and that the state child support enforcement

agency needed to recognize tribal court child support orders in the same way it recognizes orders from other states. The superior court ruled in favor of the tribes, and the state appealed.

The Uniform Interstate Family Support Act (UIFSA) governs Alaska's enforcement of child support orders issued by tribunals other than Alaska's state courts. UIFSA applies to support orders "issued in another state." When originally enacted in 1995, Alaska's version of UIFSA differed from the model version by not including Indian tribes within its definition of "state." In 2009, AS 25.25.101 was amended to include Indian tribes in its definition of "state." The law amending the statute also included the legislature's view that "UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order."

The superior court found that "the issues of child custody and child support are closely intertwined." In light of the connection, and the Court's prior holding that Alaska tribes have inherent sovereign jurisdiction to adjudicate child custody matters, the superior court held that the Central Council's jurisdiction extended to child support adjudication as well. The Alaska Supreme Court affirmed the superior court decision, holding that "the adjudication of child support obligations is a component of a tribe's inherent power 'to regulate domestic relations among members.'"

State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 371 P.3d 255 (Alaska 2016).

Legislative review is not recommended.

AS 28.35.030,
AS 28.35.032

A TRIAL COURT CAN IMPOSE EITHER CONCURRENT OR CONSECUTIVE MANDATORY FINES FOR CONVICTIONS OF DRIVING UNDER THE INFLUENCE AND REFUSAL TO SUBMIT TO A CHEMICAL TEST.

Trumbly was convicted of driving under the influence and refusal to submit to a chemical test. At sentencing, the court initially imposed the mandatory minimum fine of $1,500 for each offense concurrent to one another. A few days later, the court amended the judgment to impose the fines consecutively (for a total fine of $3,000) after the state argued that the court had no authority to impose the fines concurrently. Both

AS 28.35.030 and AS 28.35.032 contain nearly identical language that prevents a court from suspending execution of sentence or granting probation except on condition that the person serve the minimum imprisonment and pay the minimum fine. The court determined from the legislative history that the change was meant to make it clear that courts could no longer suspend the mandatory minimum fines, but said nothing about whether the court was required to impose the fines concurrently or consecutively to other fines. The court concluded that Alaska law does not prohibit the concurrent imposition of mandatory minimum fines when a defendant is sentenced for both driving under the influence and refusal to submit to a chemical test.

Trumbly v. State, 379 P.3d 996 (Alaska App. 2016).

Legislative review is not recommended unless the legislature wants to limit the ability of courts to impose concurrent mandatory minimum fines for defendants who are sentenced for both driving under the influence and refusal to submit to a chemical test.

AS 28.35.031,
AS 28.35.032,
AS 28.35.035

THE IMPLIED CONSENT STATUTORY SCHEME DOES NOT RESTRICT THE AUTHORITY OF COURTS TO ISSUE A WARRANT TO COMPEL A CHEMICAL BLOOD TEST.

A defendant was arrested for driving under the influence. After he refused a breath test, police obtained a search warrant to draw a blood sample, which showed his blood-alcohol level was over the legal limit. The defendant was subsequently charged with driving under the influence. He moved to suppress the blood test results, arguing Alaska law did not authorize courts to issue search warrants for non-consensual blood draws where only alcohol was suspected and the defendant refused a breath test.

Under AS 28.35.031(a), any person who drives a motor vehicle and is lawfully arrested for driving under the influence "shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath." AS 28.35.031(h) states: "Nothing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under this section." If a motorist refuses to submit to a breath

test, AS 28.35.032(a) provides that "a chemical test may not be given, except if the motorist was involved in an accident that caused death or physical injury, or if the motorist is unconscious or otherwise incapable of refusal, as provided under AS 28.35.035.

The Alaska Court of Appeals found that by adding subsection (h) to AS 28.35.031, the Alaska legislature declared its disagreement with Alaska Supreme Court decisions that found the implied consent statutory scheme prohibited police from obtaining a non-consensual blood draw performed pursuant to a search warrant. The Alaska Court of Appeals held, based on legislative history and the plain text of subsection (h), that the subsection aims to remove all of the limitations placed by the Court on the use of the search warrant process to investigate and obtain evidence of driving under the influence. The court, however, rejected the state's argument that subsection (h) impliedly repeals the language in AS 28.35.032(a). Instead, the court found the two statutory provisions can be harmonized, since in situations where the police are relying on the implied consent statutory scheme as authority for subjecting a person to a blood-alcohol test, they are prohibited from administering a non-consensual chemical test to a person who refuses a breath test, except as provided in AS 28.35.035. But the implied consent statutory scheme does not limit a court's authority to issue a warrant to compel a chemical blood test upon a proper showing of probable cause.

State v. Evans, 378 P.3d 413 (Alaska App. 2016).

Legislative review is not recommended unless the legislature intended a different meaning for AS 28.35.031(h) or disagrees with the court's reconciliation of AS 28.35.031(h) and AS 28.35.032(a).

AS 28.35.182

A PROBATION OFFICER IS NOT A "PEACE OFFICER" FOR THE PURPOSE OF AS 28.35.182.

Barry Bernard Sapp, Jr. was convicted of failing to stop at the direction of a peace officer after he drove away from a probation officer who asked Sapp to stop and speak with him. Sapp was convicted under AS 28.35.182, which states that a person commits the offense of failure to stop at the direction of a peace officer if the person, while driving, "knowingly fails to stop as soon as practical and in a reasonably safe manner under the circumstances when requested or signaled to do so by a peace officer."

On appeal, the Alaska Court of Appeals reversed Sapp's conviction for failing to stop at the direction of a peace officer because a probation officer is not a peace officer. "Peace officer" is defined under AS 01.10.060 to mean a state trooper, a municipal police force member, a village safety officer, a regional public safety officer, a United States marshal or deputy marshal, and "an officer whose duty it is to enforce and preserve the public peace." This definition applies to all of the Alaska Statutes unless context requires otherwise. The court found that a probation officer is not "an officer whose duty it is to enforce and preserve the public peace." A 1977 informal attorney general opinion stated that this clause showed legislative intent to include "only publicly employed law enforcement officers who have full police duties." Because the legislature has only made slight stylistic changes to the relevant statutory language since that opinion, the court found that the legislature has adopted the attorney general interpretation, under which probation officers are not "peace officers." The court also rejected application of a definition in Title 11 since that definition only applies to Title 11.

Sapp v. State, 379 P.3d 1000 (Alaska App. 2016).

Legislative review is not recommended, unless the legislature wishes to alter the definition of "peace officer" for the purpose of AS 28.35.182.

AS 28.90.030(a)

DOUBLE FINES IN TRAFFIC SAFETY CORRIDORS NOT LIMITED TO NON-CRIMINAL TRAFFIC OFFENSES.

Fyfe was charged with and convicted of driving under the influence. At sentencing, because the offense occurred in a traffic safety corridor, AS 28.90.030(a) doubles the fine, or maximum fine, for any violation of Title 28 that occurs within a highway work zone or traffic safety corridor. The Court of Appeals overturned the conviction, finding that the legislative history indicating that AS 28.90.030(a) was not intended to apply to felony driving under the influence overcame the plain language of the statute. The Supreme Court reversed the decision, finding the legislative history that was contrary to the statute's plain language was not convincing enough to overcome the plain language. Therefore, the Court held that AS 28.90.030(a) applies to both criminal and non-criminal offenses in Title 28. The Court further interpreted the statute to not apply to minimum fines, only to set amount fines or

maximum fines. Because the statute refers only to fines and maximum fines, the Court interpreted this to mean that minimum fines were specifically excluded from the doubling provision.

State v. Fyfe, 370 P.3d 1092 (Alaska 2016).

Legislative review is recommended to determine whether the legislature wants fines to be doubled for criminal traffic offenses occurring within a traffic safety corridor or highway work zone and whether the fine-doubling provision should apply to a minimum fine.

AS 33.30.295(a)

PRISONER APPEAL OF A FINAL DISCIPLINARY DECISION MUST ALLEGE SPECIFIC FACTS APPLY IN THE INITIAL COURT FILING.

In a prison discipline proceeding, a prisoner was found guilty of possessing contraband. The prisoner appealed the decision to the superior court, but the state moved to dismiss the appeal, asserting that the points on appeal were deficient under AS 33.30.295(a). The superior court granted the motion to dismiss and the prisoner appealed to the Alaska Supreme Court.

AS 33.30.295(a) provides that "[a] prisoner may obtain judicial review by the superior court of a final disciplinary decision by the department only if the prisoner alleges specific facts establishing a violation of the prisoner's fundamental constitutional rights that prejudiced the prisoner's right to a fair adjudication. . . ." On appeal, the prisoner argued that the superior court's interpretation of AS 33.30.295(a) would have required him to submit his entire appeal brief in his notice of appeal. The Court explained, however, that "[t]he plain language of AS 33.30.295(a) shows that it is intended to address the prisoner's initial filing -- the one that initiates the appeal -- and not a later-filed appellate brief." The Court further reasoned that "the statute was intended to prevent a bare-bones statement of points on appeal like [the prisoner's] from triggering a briefing schedule, the time and expense required of both parties to generate their appellate briefs, and the judicial investment of the time necessary for review and decision." Accordingly, the Court affirmed the dismissal of the prisoner's appeal.

Johnson v. State, Dep't of Corrections, 380 P.3d 653 (August 2016).

Legislative review is not recommended because the opinion appears to be consistent with legislative intent.

AS 38.05.125(a)

STATE RESERVATION OF MINERAL RIGHTS INCLUDES PORE-SPACE AND PORE-SPACE STORAGE RIGHTS.

After natural gas was depleted from a reservoir, a public utility sought to store non-native gas in the emptied pore-space of the rock. The utility acquired necessary property rights, including a lease for minerals owned by the State of Alaska and Cook Inlet Region, Inc., where the City of Kenai owned the underlying surface estate. Because of reservations required by the Alaska Land Act, these mineral rights belonged to the state and the Cook Inlet Region, Inc., and the public utility concluded that these reservations included the emptied pore-space. However, the surface owner, the City of Kenai, asserted ownership to the gas storage rights. In subsequent litigation, both the city and the Cook Inlet Region, Inc., which was joined by the state and the public utility, cross-moved for summary judgment on whether the city owned the gas storage rights. The superior court granted summary judgment in favor of the public utility, the state, and the Cook Inlet Region, Inc., finding the state's reservation of the mineral estate included underground storage rights.

The Alaska Supreme Court affirmed the superior court's ruling and held that the state and the Cook Inlet Region, Inc., owned the pore-space and the gas storage rights. The Court examined patents conveying the surface estate to the city, which recited verbatim the mineral rights reservation required by AS 38.05.125(a). Examining the statute's plain language and purpose, and applying the rule of statutory interpretation that ambiguities in public land grants are resolved strictly against the grantee and in favor of the government, the Court found that pore-space rights were reserved to the state because pore-space is mineral and therefore falls within the statutory reservation of "all [. . .] minerals [. . .] of every name, kind or description." The Court noted that although "minerals" are not defined by the Alaska Land Act, a broad interpretation is consistent with other courts' rulings and the breadth of the statutory reservation. The Court found that pore-space is an inextricable part of the rock strata and that this interpretation is supported by the purpose of the Alaska Land Act to maximize state revenue. The Court found the "American rule" that a cavern remaining after hard mineral extraction is owned by the

surface owners inapplicable because the rule is applied only in the absence of language in a deed that requires a different conclusion.

City of Kenai v. Cook Inlet Nat. Gas Storage Alaska, LLC, 373 P.3d 473 (Alaska 2016).

Legislative review is not recommended, unless the legislature would like to provide an alternative statutory definition for the term "mineral."

AS 39.50.055, AS 39.50.100

EXHAUSTION OF ADMINISTRATIVE REMEDIES NOT REQUIRED BEFORE BRINGING A SUIT ALLEGING A VIOLATION OF AS 39.50.

A group of Lake and Peninsula Borough voters brought suit against two local elected officials, alleging violations of state and local conflict of interest laws and the common law conflict of interest doctrine. The elected officials moved for summary judgment, arguing that the voters failed to exhaust administrative remedies. The superior court granted the officials' motion and stayed proceedings so that the Alaska Public Offices Commission (APOC) could review several of the voters' claims. The voters then moved for reconsideration, arguing that AS 39.50.100 expressly provided for a private right of action, barring a requirement of exhaustion of administrative remedies, and that judicial reference to APOC was inappropriate because the agency lacked exclusive jurisdiction over enforcement of AS 39.50. After the superior court denied their motion for reconsideration, the voters filed a petition for interlocutory review by the Alaska Supreme Court.

AS 39.50.055 provides an administrative remedy for the voters' claims and AS 39.50.100 provides for a private right of action for the voters' claims. Given the silence of the statutes as to whether a plaintiff must first exhaust administrative remedies before seeking a private right of action, the Alaska Supreme Court declined to infer such a requirement. The Court reasoned that nothing in the plain language or legislative history of AS 39.50.100 or AS 39.50.055 suggested legislative intent to require plaintiffs to exhaust administrative remedies before commencing a citizen suit, and, on the contrary, the legislative history of AS 39.50.055 indicated the legislature contemplated parallel administrative and judicial remedies. The Court also found that the doctrine of primary jurisdiction, under which a court may stay or dismiss pending litigation in

order to enable the proper judicial agency to initially pass on an aspect of the case that calls for administrative expertise, was inapplicable.

Seybert v. Alsworth, 367 P.3d 32 (Alaska 2016).

Legislative review is recommended if the legislature wishes to require exhaustion of administrative remedies before judicial review is sought for complaints alleging a violation of AS 39.50.

AS 42.05.711(r)

RENEWABLE ENERGY PLANTS THAT EXPAND AFTER JANUARY 1, 2016, MAY CONTINUE TO BE EXEMPT FROM REGULATION BY RCA.

AS 42.05.711 exempts certain public utilities from regulation by the Regulatory Commission of Alaska (RCA). AS 42.05.711(r) exempts certain plants or facilities that generate electricity entirely from renewable energy resources if "first placed into commercial operation on or after August 31, 2010, and before January 1, 2016." The question posed to the DOL was whether the exemption applies to an expansion of a plant or facility that qualified for the exemption, if the exemption occurs after January 1, 2016.

DOL determined the language of AS 42.05.711(r) was ambiguous. After revisiting the legislative history behind the exemption, DOL opined that "a court might or might not conclude that the exemption does not apply to a qualifying plant's or facility's expansion when that expansion was first put into operation after January 1, 2016. However an interpretation that it does not apply appears unreasonable because it creates more ambiguity and potentially undermines the overall purpose of the exemption." DOL reasoned that this conclusion "fulfills the original purpose of the legislation by encouraging additional investment into the generation of renewable energy in Alaska . . . And it avoids additional ambiguity of requiring RCA to regulate the expansion of a plant or facility while the original plant or facility remains unregulated."

2016 Op. Alaska Att'y Gen. (April 6).

Legislative review is recommended to the extent that the legislature disagrees with DOL's conclusion or wishes to revisit the exemptions afforded under AS 42.05.711(r).

AS 43.56,
15 AAC 56.015

DEPARTMENT OF REVENUE REGULATION REQUIRING OIL AND GAS PROPERTY TAXABILITY APPEALS TO BE HEARD BY THE DEPARTMENT EXCEEDS AUTHORITY.

In proceedings related to valuation of the Trans-Alaska Pipeline System, municipalities challenged 15 AAC 56.015, a Department of Revenue (DOR) regulation that all oil and gas property tax valuation appeals must be heard by the State Assessment Review Board (board), whereas oil and gas property taxability appeals must be heard by the department. The municipalities asserted that the regulation impermissibly delegated authority to decide taxability appeals to DOR and therefore contradicts AS 43.56, which grants the board exclusive jurisdiction over all oil and gas property assessment appeals. The Alaska Supreme Court agreed.

Because 15 AAC 56.015 does not implicate DOR's expertise or fundamental policies, the Court applied the substitution of judgment standard and found DOR's interpretation of the term "assessment," inconsistent with the plain text, legislative history, and purpose behind AS 43.56. The Court analyzed the overall statutory scheme, which supports treating the taxability determination as part of the assessment process, as well as common usage of the term, referring to dictionaries and usage of the term in the property assessment field. Because the Alaska Statutes distinguish "property" and "taxable property," the Court found that the assessment required by AS 43.56.060 necessarily includes a determination that property is taxable under AS 43.56. In addition, the Court found that the legislative history of AS 43.56 did not contemplate a bifurcated process for AS 43.56 appeals but instead emphasized the power of a single entity hearing all such appeals. Finally, the Court noted that for several decades, the board understood its jurisdiction to include taxability appeals.

City of Valdez v. State, 372 P.3d 240 (Alaska 2016).

Legislative review is not recommended unless the legislature intended to bifurcate the appeal process by authorizing DOR to hear appeals of oil and gas property taxability.

AS 45.45.710

THE REQUIREMENT THAT A DEALER BUY BACK MERCHANDISE THAT IS "UNUSED" APPLIES TO MERCHANDISE THAT IS IN ITS ORIGINAL PACKAGING OR IF THE MERCHANDISE WAS NEVER IN PACKAGING, MERCHANDISE THAT WAS NEVER COMMERCIALLY USED.

Miller Construction had an agreement with Clark Equipment to exclusively sell Clark-owned products. The relationship between the companies deteriorated, and eventually terminated. Miller asked that the defendant buy back three pieces of equipment, some stock attachments, and a shoe assembly track. Miller sought to recover the money it claims it is due under AS 45.45.710, which provides in relevant part:

> (a) If a dealer maintains a stock of merchandise supplied for the dealer's resale under a distributorship agreement and if the distributor or the dealer terminates the distributorship agreement, the distributor shall, unless the dealer chooses to keep the merchandise, pay the dealer for the merchandise that was purchased from the distributor and that is held by the dealer on the date of the termination an amount equal to
> (1) the fair market value for merchandise that is unused and for which the retailer has paid the distributor, plus 100 percent of the transportation charges paid by the dealer to return the merchandise to the distributor; in this paragraph,
> (A) "fair market value" means the amount the distributor would realize from the sale of the merchandise to another retailer using reasonable good faith efforts;
> (B) "unused" means unopened merchandise that is still in the original factory packaging or container;

Miller argued that for the purposes of this statute, "unused" means equipment that has less than 300 hours of use. Miller argued that the court should ignore the definition of "unused" that requires merchandise to be in its original packaging for the purposes of heavy equipment buy back obligations. This is because heavy equipment does not come in packaging and also because the agreement between the parties expressly provided that equipment with less than 300 hours is considered "new"

equipment. The district court noted that the Alaska Supreme Court has never considered how to apply AS 45.45.710 in the context of equipment that was never in packaging. The district court held that for merchandise that was never in packaging,

"unused" means merchandise that was never commercially used. The court determined this was consistent with the purpose of the statute and the plain meaning of "unused."

Miller Construction Equipment Sales, Inc., v. Clark Equipment Co., 2016 WL 2626803 (D. Alaska 2016).

Legislative review is recommended if the legislature disagrees with the court's interpretation of "unused" for purposes of heavy equipment or other merchandise that does not come in packaging.

AS 47.30.735,
AS 47.30.915(9)

THE INABILITY TO FUNCTION WITH OUTSIDE SUPPORT IS PART OF THE BURDEN OF PROVING THAT NO LESS RESTRICTIVE ALTERNATIVE EXISTS, WHICH IS A CONSTITUTIONAL PREREQUISITE TO INVOLUNTARY HOSPITALIZATION.

The superior court issued a 30-day involuntary commitment order after finding the respondent was gravely disabled and "entirely unable to fend for himself independently in the community." The respondent appealed and argued that there was insufficient evidence to prove he could not live independently with family support.

On appeal, the state argued that it was the respondent's burden to prove he had the necessary outside support and he failed to carry that burden. The Alaska Supreme Court declined to place this burden on the respondent and explained that "[p]roving the respondent's inability to function independently with support, when relevant, is simply part of the petitioner's burden of proving that there is no less restrictive alternative to involuntary confinement -- a required element of any petition." In construing AS 47.30.735, which governs 30-day commitment hearings, and the definition of "gravely disabled" in AS 47.30.915(9), the Court further held "that a petitioner must prove, by clear and convincing evidence, the petition's allegation that there are no less restrictive alternatives. This is not a secondary concern, nor is it—as the structure of AS 47.30.735(c) and (d) might suggest—something to be considered only after the Court has decided that the respondent

should be committed. Finding that no less restrictive alternative exists is a constitutional prerequisite to involuntary hospitalization."

In re Mark V., 375 P.3d 51 (Alaska 2016).

No legislative action is recommended.

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