STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

THIRTY-SECOND STATE LEGISLATURE

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

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

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A REPORT TO THE THIRTY-SECOND STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals, Delayed Enactments, and 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2022, and March 1, 2023, according to laws enacted before the 2022 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2020, and September 30, 2021,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2020, and September 30, 2021.

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INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine 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.

This report also includes a list of Alaska Statutes that, absent any action by the 2022 Legislature, will be repealed or amended before March 1, 2023, because of repeals 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 Marie Marx, Andrew Dunmire, and Sandon Fisher, Legislative Counsel, and Linda Bruce, Assistant Revisor of Statutes. Linda Bruce, Assistant Revisor of Statutes, prepared the list of delayed repeals, enactments, and amendments.

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DELAYED REPEALS, ENACTMENTS, AND AMENDMENTS

taking effect between February 28, 2022, and March 1, 2023, according to laws enacted before the 2022 legislative session

There are no delayed repeals, enactments, or amendments taking effect between February 28, 2022, and March 1, 2023.

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the statement above. Also, the statement 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.

Art. I, sec. 1, Constitution of the State of Alaska, AS 47.12.020 AS 47.12.030(b)(1)

CHARGING MINORS ACCUSED OF VIOLATING MISDEMEANOR DRIVING OFFENSES IN ADULT COURT AND MINORS ACCUSED OF VIOLATING FELONY DRIVING OFFENSES IN JUVENILE COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A 14-year-old was charged in adult court with two counts of misdemeanor DUI. She was convicted and appealed, arguing that the prosecution of a juvenile in adult court rather than juvenile court violated her equal protection and due process rights. AS 47.12.020 establishes the general rule that minors who have violated criminal laws are subject to the jurisdiction of a juvenile court. However, AS 47.12.030(b)(1) provides an exception to that rule, directing that minors accused of violating a misdemeanor traffic violation shall be charged in adult court. The result is that a minor charged with felony DUI will be prosecuted in juvenile court, while minors charged with misdemeanor DUI must defend themselves in adult court.

The Supreme Court conducted an equal protection analysis by looking at the differing ways in which minors charged with nonfelony traffic offenses are treated from minors charged with felony traffic offenses. The Court concluded "that the inclusion of juvenile DUI offenses in the same system as other driving offenses closely promotes the State's interest in a uniform system of penalties to deter bad driving and protect the public." The Court also determined that excluding minors who commit felony traffic offenses from the adult system is closely related to the state's interest in promoting the rehabilitation of juvenile offenders. Accordingly, the Court held that the classification created by AS 47.12.030(b) does not violate the equal protection clause.

Watson v. State, 487 P.3d 568 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to change the statutory scheme for charging minors accused of a DUI offense to (1) charge all minor DUI offenders in either adult court or juvenile court; or (2) charge minor felony DUI offenders in adult court and minor misdemeanor DUI offenders in juvenile court.

Art. I, sec. 11, Constitution of the State of Alaska, Alaska Administrative Rule 15

THE PRESIDING JUDGE OF A JUDICIAL DISTRICT MAY EXCLUDE SURROUNDING VILLAGES FROM JURY SELECTION IN CRIMINAL CASES IF TRANSPORTING RESIDENTS FROM THE VILLAGES TO THE TRIAL SITE WOULD BE UNREASONABLY EXPENSIVE.

Smith was convicted of attempted murder and other felonies committed near the village of Kiana. His trial was held in Kotzebue, with a jury pool comprised of people living within five miles of Kotzebue. Administrative Rule 15 normally calls for a jury pool to be drawn from all eligible people living within a 50-mile radius of the trial site—a geographic area around Kotzebue that would have included two surrounding villages (but not Kiana). However, Rule 15 also gives presiding judges the authority to specify a different area, and since 1986 the presiding judges of the Second Judicial District have issued a series of orders setting the radius at five miles around Kotzebue due to the expense of transporting and housing prospective jurors from the two surrounding villages. The Court of Appeals remanded the case to the trial court to determine whether the selection method used here ran afoul of Rule 15. The trial court upheld the presiding judge's order, and Smith again appealed.

Upon review, the Court of Appeals held that so long as the resulting geographic area reflects the community in which the alleged crime occurred, Rule 15 permits a presiding judge to restrict the jury pool area based on purely monetary considerations. In this case, the situation in Kotzebue was not equivalent to Bethel or Dillingham (where potential jurors are brought in from surrounding communities), and the geographic reduction could be justified by monetary considerations.

Smith v. State, 484 P.3d 610 (Alaska App. 2021).

Legislative review is not recommended.

Art. I, sec. 14, Constitution of the State of Alaska
Art. I, sec. 22, Constitution of the State of Alaska

IT IS UNCONSTITUTIONAL FOR A LAW ENFORCEMENT OFFICER CONDUCTING A ROUTINE TRAFFIC STOP TO REQUEST A PASSENGER'S IDENTIFICATION AND USE THAT IDENTIFICATION TO RUN A WARRANTS CHECK WITHOUT ANY CASE-SPECIFIC JUSTIFICATION FOR DOING SO.

A police officer initiated a traffic stop because a vehicle had an obscured license plate. The officer asked the defendant, who was a passenger in the vehicle, for his license. The police officer ran the defendant's name through the Alaska Public Safety Information Network database and discovered that there was an outstanding search warrant for the defendant. The officer took the defendant into custody and subsequently located a firearm belonging to the defendant in the vehicle. The defendant was convicted of several weapons charges related to the stop.

Article I, sec. 14 of the Alaska Constitution prohibits unreasonable searches and seizures by the government. On appeal, the Alaska Court of Appeals noted that in part because of the Alaska Constitution's explicit guarantee of privacy in art. I, sec. 22, Alaska courts have repeatedly interpreted art. I, sec. 14 to provide greater protection than the corresponding provisions of the Fourth Amendment to the United States Constitution. The court concluded that the request for a passenger's identification is a significant event under the Alaska Constitution and held that it is unconstitutional for a law enforcement officer conducting a routine traffic stop to request identification from a passenger in the vehicle and then use that identification to run a warrants check when the officer's request is unrelated to the traffic stop and the officer has no other case-specific justification for doing so.

Perozzo v. State, 493 P.3d 233 (Alaska App. 2021).

Legislative review is not recommended.

Art. XII, sec. 7, Constitution of the State of Alaska, AS 14.25.062 AS 39.35.350

THE REPEAL OF THE STATUTORY RIGHT TO REINSTATEMENT OF BENEFITS AND CREDITED SERVICE TIME IN ALASKA'S RETIREMENT SYSTEMS DIMINISHED OR IMPAIRED FORMER EMPLOYEE'S ACCRUED BENEFITS IN VIOLATION OF ART. XII, SEC. 7 OF THE ALASKA CONSTITUTION.

The legislature repealed AS 14.25.062 and AS 39.35.350, which allowed state employees who left state employment and withdrew their contributions to the system to later, upon returning to eligible employment and repaying their withdrawn contributions, be reinstated to their original benefits level and have their credited service time restored. A former employee, Metcalfe, who was eligible under AS 39.35.350 at the time he enrolled in state employment, sued arguing that the repeal of the statute violated his rights under art. XII, sec. 7 of the Alaska Constitution, which provides that the accrued benefits of a state employee retirement system "shall not be diminished or impaired."

The Alaska Supreme Court first noted that "accrued benefits" are defined broadly by the courts. The Court found that the statute, which allowed employees to leave state employment and later buy back in, provided a clear benefit to Metcalfe. The Court further noted that persons could reasonably rely on the statute when considering the advantages and disadvantages of state employment. The Court considered the statutory option "an element of the bargained-for consideration" the state gave in exchange for an employee's assumption and performance of an employee's duties. The Court determined that for purposes of the constitutional protection, the benefit became an accrued benefit when the plaintiff became employed and enrolled in the system.

The state also argued that Metcalfe, as a former employee, is not a member of the retirement system within the meaning of the retirement statutes, and therefore the constitutional prohibition does not apply to him. The Court, however, agreed with Metcalfe that "the key determination for whether an individual has standing to claim article XII, section 7 protection is whether they have a vested right to a benefit *generated* by membership in the State's public retirement systems." The Court found that, because the benefit was only available to former members, saying that Metcalfe cannot claim the benefit because he is a former member would "render the State's promise illusory and . . . diminish or impair

the promised benefit." For these reasons, the Court held that "the statutory reinstatement right was an accrued benefit of the retirement system protected against diminishment or impairment by article XII, section 7."

Metcalfe v. State, 484 P.3d 93 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to review the repeal of AS 14.25.062 and AS 39.35.350 in light of this decision.

Art. I, sec. 15, Constitution of the State of Alaska, AS 12.55.125 AS 12.55.165

COURTS MAY APPLY THE 2013 SESSION LAW AMENDING SENTENCING STATUTES TO CASES THAT AROSE BEFORE THE LAW'S ENACTMENT WITHOUT VIOLATING THE EX POST FACTO CLAUSE.

In 2006, the legislature amended AS 12.55.125 to set higher presumptive sentencing ranges for offenders convicted of sexual felonies. Collins committed a sexual felony in 2008, was convicted of first-degree sexual assault, and found to be subject to an increased sentencing range. In a two-to-one decision, the Court of Appeals remanded so that Collins could renew his request to have his case referred to the three-judge sentencing panel authorized to sentence defendants outside the presumptive range on two factors discussed by the court. In 2013, while the case was pending, the legislature enacted a session law which declared that the majority opinion in the first case misconstrued the 2006 sentencing statute and amended AS 12.55.165, the statute governing referrals to the three-judge sentencing panel, to be consistent with the dissenting opinion. The superior court denied Collins's request for a referral to the three-judge panel, reasoning that, under the provisions of the 2013 session law, the panel no longer had the authority to reduce Collins's sentence. Collins appealed the superior court's decision, arguing that, because his crime was committed before the 2013 session law was enacted, the *ex post facto* clauses of the federal and state constitutions prohibit the courts from applying the 2013 session law to him.

The Alaska Court of Appeals considered the statute under the doctrine of "clarifying legislation," which governs situations where the legislature enacts new legislation to clarify the intention or meaning of a pre-existing statute that is under litigation. If the new legislation does not change but only

clarifies existing law, courts will treat the pre-existing statute as if it had always meant what the later enactment declared its meaning to be.

The court concluded that the 2013 session law qualifies as "clarifying" legislation because the 2013 enactment did not change Alaska sentencing law, but rather clarified the meaning of the pre-existing sentencing statute. Because the 2013 law was a clarification of Alaska's sentencing law, the court held that the *ex post facto* clauses of the federal and state constitutions do not bar courts from applying the law stated in the 2013 session law to cases that arose before enactment of the session law. Therefore, under Alaska sentencing law as it existed when Collins committed his crime, Collins was not entitled to seek referral to the three-judge panel based on either of the two factors identified in the majority opinion.

Collins v. State, 494 P.3d 60 (Alaska App. 2021).

Legislative review is not recommended.

U.S. Const. Amend. I,
AS 15.13.070(b)(1)
AS 15.13.070(d)
AS 15.13.072(e)

THE $500 INDIVIDUAL-TO-CANDIDATE CONTRIBUTION LIMIT, THE $500 INDIVIDUAL-TO-GROUP CONTRIBUTION LIMIT, AND THE $3,000 PER YEAR NONRESIDENT AGGREGATE CONTRIBUTION LIMIT VIOLATE THE FIRST AMENDMENT; THE $5,000 POLITICAL PARTY TO MUNICIPAL CANDIDATE LIMIT IS CONSTITUTIONAL.

Plaintiffs challenged the following campaign contribution statutes on the grounds that they violate the First Amendment: (1) the $500 annual limit on an individual contribution to a political candidate, (2) the $500 limit on an individual contribution to a nonpolitical party group, (3) the annual limits on what a political party may contribute to a candidate, and (4) the annual aggregate limit on contributions a candidate may accept from nonresidents.

On remand from the United States Supreme Court, the Ninth Circuit Court of Appeals considered five factors to determine whether the state's contribution limits were constitutional under the First Amendment: (1) whether the limits would significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether

political parties must abide by the same low limits that apply to individual contributors; (3) whether volunteer services or expenses are considered contributions that would count toward the limit; (4) whether the limits are indexed for inflation; and (5) whether there is any "special justification" that might warrant such low limits.

Applying the five factors to the $500 individual-to-candidate limit, the Ninth Circuit determined that the state failed to show that the limit was closely drawn to meet its objectives. The Ninth Circuit found that the limit significantly restricted the amount of funds available to challengers to run competitively against incumbents and was not indexed for inflation. Moreover, the state did not establish a special justification for such a low limit, such as corruption or the appearance of corruption being more prevalent in the state. Therefore, the individual-to-candidate limit violated the First Amendment.

Similarly, the Ninth Circuit found that the $500 individual-to-group limit was not closely drawn to restrict contributors from circumventing the individual-to-candidate limit. The limit was not adjusted for inflation and was lower than limits in other states. The Ninth Circuit concluded that because the statute was poorly tailored to the state's interest in preventing circumvention of the base limits, it impermissibly restricted participation in the political process and was unconstitutional.

The Ninth Circuit upheld the $5,000 limit on the amount a political party may contribute to a municipal candidate. The Ninth Circuit determined that limiting party sub-units to the $5,000 limit but not limiting multiple labor-union political action committees to the same limit was not unconstitutionally discriminatory because the groups are not analogous.

The Ninth Circuit determined that the nonresident aggregate limit, which bars a candidate from accepting more than $3,000 per year from individuals who are not residents, did not target quid pro quo corruption or its appearance. The Ninth Circuit noted that, even if "limiting the inflow of contributions from out-of-state extractive industries served an anti-corruption interest, the nonresident aggregate limit is a poor fit." The Ninth Circuit also rejected the state's argument that the nonresident limit targets the important state interest of protecting its system of self-governance. For these reasons, the statute was unconstitutional.

Thompson v. Hebdon, 7 F.4th 811 (9th Cir. 2021).

Legislative review is recommended if the legislature wishes to amend the amounts allowed for political contributions.

U.S. Const. Amend. IV

THE GOVERNMENT MAY RETAIN COMPUTER DEVICES SEIZED PURSUANT TO A PROBATION SEARCH FOR FOUR MONTHS WITHOUT RETURNING THE DEVICES TO THEIR OWNER.

Chandler was on probation for a possession of child pornography conviction when his probation officer seized computer devices from his home. Based upon a search of those devices, he was again convicted of possessing child pornography. Chandler argued that the probation officer exceeded her authority when she seized the devices, but that argument was not preserved for appeal. Chandler also argued that the government kept the devices in their possession for an unreasonably long time (almost four months) before securing a search warrant. Therefore the only question on appeal was whether the seizure of Chandler's computers became unreasonable due to the delay in securing a search warrant.

The Court of Appeals noted that, generally, when police have probable cause to believe that property contains evidence of a crime and they seize the property without a warrant, the police may only temporarily hold the property until they can secure a warrant. However, the court found that in Chandler's case the government was authorized to seize and search his computers by the terms of his probation. So long as the troopers confined their search to the boundaries authorized by Chandler's probation conditions—which they did—no warrant was necessary despite the fact that it took them nearly four months to conduct their search.

At the end of its opinion, the court invited the Alaska Supreme Court to study how long a digital device should properly be held after seizure without returning the device (or the data on the device) to its owner. The court stated that there should be time standards for the government's forensic search of seized computers or for giving the computer owners access to the non-criminal contents of their devices. The court stated that such standards "should be codified in the court rules, rather than being left to the discretion of individual trial court judges (or appellate judges, for that matter)."

Chandler v. State, 487 P.3d 616 (Alaska App. 2021).

Legislative review is not recommended, unless the legislature wishes to establish time standards for the retention and return of seized digital devices.

Alaska Civil Rule 24(b), AS 47.10.080(s)

IN LIMITED SITUATIONS, FOSTER PARENTS MAY INTERVENE IN A CHILD-IN-NEED-OF-AID PERMANENCY HEARING.

A child was temporarily placed with foster parents when the Office of Children's Services (OCS) decided to permanently place the child with the child's grandmother. The foster parents asked to intervene in the child in need of aid (CINA) proceedings to contest that placement decision. The child had significant mental, social, and physical needs, and several witnesses, including the child's teacher and pediatrician, testified that the foster parents were better equipped to deal with those needs than the grandmother. The trial court, noting that it was unusual for foster parents to have any colorable claim to contest OCS's discretion, allowed the intervention and ultimately ruled that OCS abused its discretion in placing the child with the grandmother. OCS appealed.

Under AS 47.10.080(s), OCS has discretion to transfer a child from one placement to another "in the child's best interests." That statute allows any "party opposed to the proposed transfer" to request a hearing and contest OCS's placement. Because "party" is not defined in this statute, the Alaska Supreme Court used the definition of "party" found in the CINA Rules, which includes "any other person who has been allowed to intervene by the court." The Court also applied Civil Rule 24, which governs intervention, to the CINA proceedings.

The Alaska Supreme Court first agreed with OCS that allowing foster parents to intervene as a matter of course is generally contrary to the goals of the CINA statutes. The Court noted that if foster parents only seek to intervene to explain their attachment to the child and plans for the child's future in contrast to those of the biological parent, their involvement will in most cases be more prejudicial than helpful. "On the other hand, as this case demonstrates, the law should accommodate the rare case in which the trial court reasonably decides that foster parents have *relevant* evidence it is not

likely to receive from the existing parties." The Court's analysis gave great weight to the legislature's admonition that CINA laws "shall be liberally construed" so that a child receives "the care, guidance, treatment, and control that will promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interests." For these reasons the Court concluded that, while trial courts should be hesitant to allow foster parent intervention, the practice is not precluded as a matter of law when permissive intervention under Civil Rule 24(b) is necessary to promote the child's best interests.

Dept. of Health & Social Services, Office of Children's Services v. Zander B., 474 P.3d 1153 (Alaska 2020).

Legislative review is not recommended, unless the legislature wishes to preclude foster parents from intervening in a CINA permanency hearing.

Rule of Evidence 801(d)(3)

THE HEARSAY EXCEPTION ALLOWING FORENSIC INTERVIEWS OF CHILDREN TO BE PLAYED AT TRIAL DOES NOT APPLY TO GRAND JURIES.

Powell was indicted for two felony crimes involving a minor. During its grand jury presentation, the state introduced a video recording of an interview of the minor. The minor did not testify. Alaska Evidence Rule 801(d)(3) allows a recorded interview of a minor alleged victim to be played over a hearsay objection if the minor is "available for cross-examination." Because the minor did not testify at grand jury, Powell argued that she was unavailable for cross-examination and that the interview should not have been played. The trial court agreed with him and dismissed the indictment. The State appealed.

The Court of Appeals first considered the legislative history of Rule 801(d)(3), which was enacted by the legislature in 2005. The state pointed to legislative history suggesting that the legislature intended that a child witness would only have to describe an alleged offense once before the trial. But the court noted that the legislative sponsor of the rule declared in committee that the "most crucial" aspect of the rule was that the alleged victim be "present at the proceeding and available to testify." The court determined that it was clear from the legislative history—and from the plain language of Rule 801(d)(3)—that the legislature's focus was on the admissibility

of the video recording at trial. The court stated that "[t]he legislative history contains no discussion of the grand jury proceeding or how the conditions that the legislature specifically included to protect a defendant's rights at trial could apply at the time of grand jury." The court also noted that Rule 801(d)(3) was crafted to protect the defendant's right of confrontation, and since a defendant may not cross-examine a witness at grand jury, applying the rule in that context may raise constitutional issues. Finally, the court found that when the legislature promulgated Rule 801(d)(3), it took no action to broaden Criminal Rule 6(r)(2), the rule that permits certain hearsay statements by children to be admitted at grand juries.

Consequently, the plain language and legislative history of Rule 801(d)(3) indicate that the legislature did not consider the grand jury proceeding when it promulgated the rule. As a result, the court held that the rule cannot be used to admit recorded child interviews at grand jury.

State v. Powell, 487 P.3d 609 (Alaska App. 2021).

Legislative review is not recommended, unless the legislature intends to allow the admission of recorded child interviews in grand jury proceedings.

AS 09.20.185
AS 09.55.540

IN A MEDICAL MALPRACTICE CASE, THE COURT MUST CONSIDER EXPERT WITNESS QUALIFICATIONS UNDER AS 09.20.185 IN LIGHT OF THE SPECIAL BURDEN OF PROOF REQUIREMENTS UNDER AS 09.55.540.

A husband and wife, the Beistlines, filed a medical malpractice suit against several medical care providers after the wife suffered a seizure, alleging that the wife's seizure was the result of a physician cutting off her medications. The medical providers moved for summary judgment. The Beistlines opposed the motion, relying only on the affidavit of pharmacist Dr. Holmquist. Citing AS 09.20.185(a), the superior court explained that an expert witness in professional negligence cases must be "certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue." The court granted summary judgment to the medical care providers, concluding that the couple's only expert witness, a pharmacist, was unqualified to provide testimony about the matter at issue

because he was not a doctor of internal medicine and was not board-certified in the doctor's field or specialty.

The Alaska Supreme Court affirmed the superior court's ruling on different grounds. It explained that even if Dr. Holmquist was otherwise qualified as an expert under AS 09.20.185, under AS 09.55.540(a)(1), a plaintiff in a medical malpractice case must still prove "the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing." Because Dr. Holmquist did not practice in the same field or specialty as the defendant as required under AS 09.55.540(a)(1), the Court held the testimony he provided was insufficient to create a genuine issue of material fact and the Beistline's claims could not survive summary judgment.

Beistline v. Footit, 485 P.3d 39 (Alaska 2021).

Legislative review is not recommended.

AS 09.45.052(a)

AN ADVERSE CLAIMANT'S BELIEF OF POSSESSING LAND NEED ONLY BE SINCERELY RATHER THAN REASONABLY BELIEVED.

Hurd and Henley share a boundary line that Henley first encroached on by building a shed and then by building a larger shop. Hurd sued and Henley filed a counterclaim, arguing that he had adversely possessed the disputed area. Under AS 09.45.052(a), to gain title under adverse possession, a claimant must have engaged in possessory activities "because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant." The superior court awarded the area originally occupied by Henley's shed and the area surrounding it to Henley, but not the larger area with the shop.

As a matter of first impression the Alaska Supreme Court considered whether AS 09.45.052(a)'s good-faith provision requires that the claimant's belief of ownership be reasonably held as well as sincerely held. The Court found that the legislative history of the 2003 amendments to the adverse possession statutes demonstrates clear legislative intent to eliminate adverse possession claims by trespassers in "bad faith," or "squatters." While the bill's drafters made no

statements explicitly characterizing the "good faith" requirement as either objectively reasonable or subjectively held, the Court determined that the legislative history supported an interpretation that "good faith" was intended to be subjective. Because "neither the statutory text nor the legislative history indicates that the phrase specifically requires an objective standard of good faith," the Court held the "good faith but mistaken belief" required for adverse possession requires only subjective good faith.

Hurd v. Henley, 478 P.3d 208 (Alaska 2020).

Legislative review is not recommended.

AS 12.45.120
AS 12.45.130
AS 12.45.140

A CIVIL COMPROMISE MUST BE APPROVED BY A COURT TO BE BINDING AND TRIGGER DOUBLE JEOPARDY.

Azzarella was charged by felony complaint with assault in the first, second, and third degrees. At his preliminary hearing, the state dismissed two of the felony charges and reduced the remaining two charges to misdemeanors. Two days later, Azzarella's attorney filed a notice of civil compromise. Before the hearing on the civil compromise occurred, a grand jury indicted Azzarella on the original felony charges. Nevertheless, the trial court dismissed the indictment, ruling that the civil compromise was "completed" when the notice was filed and that any subsequent prosecution would violate double jeopardy. The state appealed.

Under AS 12.45.120, a defendant and crime victim may reach a civil compromise in certain misdemeanor crimes "for which the person injured by the act constituting the crime has a remedy by a civil action." When a civil compromise is proposed, AS 12.45.130 grants courts the discretion to accept or reject the compromise and, once a compromise is accepted, bars further prosecution for the crime.

In this case, the Court of Appeals found that a civil compromise only becomes effective if a court agrees to accept the compromise. The court noted that the "filing of a notice of civil compromise simply alerts the court that the defendant is proposing a non-criminal resolution of the case; such notice does not direct the court to accept or reject a particular agreement, nor does it confer a right of dismissal upon the

accused." The court concluded that "[u]nder AS 12.45.130, it is the court's order approving a civil compromise and dismissing the charges against a defendant—not the defendant's request for such an order" that triggers double jeopardy. Because the state obtained a grand jury indictment and reinstated the felony charges before the trial court accepted the civil compromise, it was error for the trial court to accept the civil compromise. The court also held that filing a notice of civil compromise does not automatically stay the proceedings, as the plain language of AS 12.45.140 explicitly provides otherwise.

State v. Azzarella, 483 P.3d 904 (Alaska App. 2021).

Legislative review is not recommended.

AS 12.47.010 – 12.47.050

A DEFENSE OF INVOLUNTARY INTOXICATION DOES NOT AUTOMATICALLY TRIGGER A "GUILTY BUT MENTALLY ILL" FINDING.

Dorsey was convicted of second-degree sexual assault. Prior to trial, Dorsey filed a notice that he might rely on the defense of involuntary intoxication based on the result of an adverse reaction to a prescription muscle relaxant. Dorsey's attorney proposed to call a doctor as an expert to testify that Dorsey was "more impulsive" and "less inhibited" as a result of the muscle relaxant. The trial court ruled that an adverse reaction to a prescription medication was a legally adequate basis for proceeding with an involuntary intoxication defense. But because no statutory provision existed specifically allowing the defense, such a defense would be a subset of an insanity defense. Therefore, the trial court would instruct the jury that if it accepted Dorsey's involuntary intoxication defense, it must find him "guilty but mentally ill" under AS 12.47.030.

On appeal, the Alaska Court of Appeals explained that the insanity, diminished capacity, and "guilty but mentally ill" statutes under AS 12.47.010 – 12.47.030 are all premised on the notion that the defendant was suffering from a "mental disease or defect" at the time of the conduct. In turn, "mental disease or defect" is defined by AS 12.47.130(5) as "a disorder of thought or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." Legislative history from 1982 indicates that the current statute was only intended to include

major mental disorders. The legislative intent made clear that the "mild transient delirium" at issue in this case did not meet the statutory definition to qualify as a "mental disease or defect." The appellate court therefore held that the trial court erred by finding that Dorsey's involuntary intoxication defense required a "guilty but mentally ill" verdict.

However, the appellate court also determined that the court's error did not mean that Dorsey was entitled to present his defense. The court noted that while the defense of involuntary intoxication is not codified in Alaska, it has long been recognized under common law. Specifically, the court explained that "the excuse form of the involuntary intoxication defense is only available if the intoxication 'puts the defendant in a state of mind which resembles insanity.'" Dorsey's "irresistible impulse" may have been sufficient to claim involuntary intoxication before the 1982 change in law, but the legislature has not enacted a statute addressing this type of involuntary intoxication defense. Because Dorsey was not suffering from a qualifying "mental disease or defect," he was not entitled to present his involuntary intoxication defense.

Dorsey v. State, 480 P.3d 1211 (Alaska App. 2021).

Legislative review is not recommended unless the legislature wishes to consider enacting a statute addressing the involuntary intoxication defense.

AS 12.55.015(g)
AS 12.55.127
AS 33.16.090

ELIGIBILITY FOR DISCRETIONARY PAROLE IS CALCULATED BASED ON THE LENGTH OF A PRISON SENTENCE WITHOUT CONSIDERING GOOD TIME CREDIT.

Seaman was sentenced to 70 years with none of his sentence suspended. Seaman filed an application for post-conviction relief arguing that the Department of Corrections (DOC) had miscalculated his discretionary parole eligibility date. Under AS 33.20.010(a), most prisoners sentenced to a term of imprisonment are entitled to good time credit if the prisoner follows the rules of their correctional facility. If the prison term is two years or longer, the prisoner who earns good time credit will be released on *mandatory* parole "until the expiration of the maximum term to which the prisoner was sentenced." The pre-2019 version of AS 33.16.090(b)(1) prohibited a prisoner from being released on *discretionary*

parole until they have served at least one-third of their active term of imprisonment. Under AS 12.55.127, "active term of imprisonment" is defined as "the total term of imprisonment imposed for a crime, minus suspended imprisonment."

To determine whether Seaman's discretionary parole had been miscalculated, the Court of Appeals considered whether the definition of "active term of imprisonment" includes a deduction for good time credit when calculating eligibility for discretionary parole. DOC noted that the plain language of the statute addresses the "active" term of imprisonment and the "suspended" term of imprisonment. Because statutory good time is not a "suspended" term of imprisonment, DOC reasoned that good time is included in the calculation of a defendant's active term of imprisonment. Seaman argued that AS 12.55.015(g), which allows a defendant's sentence to be divided into one part that must be served in prison before becoming eligible for mandatory parole and one part that may be served on supervised release, required DOC to deduct good time from the calculation. But the court determined that the legislative history did not support Seaman's position. The legislature enacted subsection (g) to take advantage of a federal incentive program that provided funds to states that could demonstrate their prisoners served 85% of their sentences. The provision was enacted to allow the state to reach this benchmark by excluding good time credit and the legislative history made clear that "[t]he legislature was otherwise assured that this provision would not affect how sentences were imposed or how eligibility for discretionary and mandatory parole was determined."

The court concluded that the plain meaning and legislative history of the relevant statutes supported DOC's interpretation of "active term of imprisonment" and held that DOC is not required to deduct a defendant's statutory good time credit when calculating a defendant's eligibility for discretionary parole unless otherwise specified by statute.

Seaman v. State, 2021 WL 4343851 (Alaska App. Sept. 24, 2021).

Legislative review is not recommended.

AS 12.55.085
AS 12.55.090
AS 12.80.040
AS 28.90.010

A SENTENCING COURT MAY NOT SUSPEND THE IMPOSITION OF SENTENCE FOR A TITLE 28 INFRACTION.

Meyers was convicted of negligent driving, an infraction punishable by a fine not to exceed $300. The magistrate granted Meyers a suspended imposition of sentence (SIS). The state appealed, arguing that no statutory authority permits a sentencing court to grant an SIS to a defendant convicted of an infraction under Title 28.

The Court of Appeals first noted that no provision in AS 28.90.010, or any other provision of Title 28, specifically authorizes a court to impose probation or grant an SIS for a defendant convicted of an infraction. After reviewing the legislative history behind AS 12.55.085 and 12.55.090, which allow a court to grant an SIS and probation, the court concluded that the legislature only gave courts the authority to grant an SIS or probation for infractions (as opposed to offenses) in Title 11 (the general crime statutes) or Title 16 (fish and game). The court also considered the legislative history of AS 12.80.040, which states that "[e]xcept as provided in . . . AS 28.90.010(d), all laws of the state relating to misdemeanors apply to violations and infractions. . . ." The court determined that this statute applied to criminal procedures and not to criminal penalties. Accordingly, because no statutory authority exists under Title 12 or Title 28, the court held that Alaska courts may not grant an SIS when a defendant is convicted of an infraction under Title 28.

State v. Meyers, 479 P.3d 840 (Alaska App. 2020).

Legislative review is not recommended, unless the legislature would like to allow individuals convicted of driving infractions under Title 28 to be eligible for an SIS.

AS 12.55.085
AS 12.63.010 – 12.63.100

A CONVICTION THAT HAS BEEN SET ASIDE IS NOT A "CONVICTION" FOR PURPOSES OF REGISTRATION UNDER THE 1994 VERSION OF THE ALASKA SEX OFFENDERS REGISTRATION ACT.

Maves was convicted of two sexual assaults in Colorado in 1997. He moved to Alaska in 2015, where the Department of Public Safety (DPS) required him to register for life as a sex offender under the Alaska Sex Offenders Registration Act

(ASORA). Maves appealed, arguing that one of the two convictions could not be used as the basis for a lifetime registration requirement because it had been set aside. ASORA currently defines "conviction" to include convictions that have been set aside, but Maves was subject to the 1994 version of ASORA since his offenses occurred in 1997, which did not include that definition. Maves argued that a 1995 regulation that defined "conviction" as including those that had been set aside was invalid because ASORA did not expressly include persons whose convictions were set aside and DPS lacked authority to expand the Act's reach by regulation.

The Alaska Supreme Court found that given ASORA's central purpose, to monitor offenders who "pose a high risk of reoffending," adding offenders whose convictions had been set aside by regulation was not reasonably necessary to implement ASORA. The Court noted that the legislature could itself define "conviction" to include convictions that had been set aside, as it later did in 1999. Because the legislature did not expressly include set-aside convictions in the 1994 version of ASORA, the Court concluded that the 1995 regulation was invalid as outside the scope of the enabling legislation. Therefore, the Court held that the set-aside conviction was not a "conviction" for purposes of registration under the 1994 version of ASORA.

Maves v. State, 479 P.3d 399 (Alaska 2021).

Legislative review is not recommended.

AS 12.55.090(c)

A DEFENDANT RE-SENTENCED TO PROBATION IN 2016 MUST BE SENTENCED ACCORDING TO THE LAW IN EXISTENCE AT THAT TIME.

In 2015, Johnson was convicted of a misdemeanor and sentenced to three years of probation. At that time, AS 12.55.090(c) capped the term of probation for misdemeanors at ten years. In 2016, the legislature, through SB 91, revised AS 12.55.090(c) and imposed a new cap that varied from one to three years depending upon the crime. In 2017, Johnson came back before his sentencing court on a petition to revoke probation. After finding that he violated probation, the trial court re-sentenced Johnson to probation and increased his probation term from three years to five years. Johnson appealed.

On appeal, the state argued that Johnson should be sentenced under the 2015 version of AS 12.55.090(c). Johnson argued that the trial court was bound by the version of the statute that existed when he was re-sentenced in 2017. The Court of Appeals agreed with Johnson. It noted that when the legislature revised AS 12.55.090(c), "it expressly stated that the revised statute 'applied to probation ordered on or after the effective date . . . for offenses committed before, on, or after the effective date.'" Moreover, the statute itself stated that the "period of probation, together with any extension, may not exceed" the relevant maximum term. Therefore, the appellate court concluded that the legislature intended that any new periods of probation or extensions of the original probation period ordered on or after the effective date of SB 91 would not exceed the maximum terms of probation set out in the new statute.

The court also noted that the legislature subsequently passed HB 49, which repealed the 2016 version of AS 12.55.090(c). After that revision, the maximum term of probation for misdemeanors is again capped at ten years. However, that change applies only "to conduct occurring on or after the effective date" of HB 49. Thus, the case was remanded to the trial court with instructions to follow the 2016 version of AS 12.55.090(c), which limits Johnson's probation to three years.

Johnson v. State, 477 P.3d 665 (Alaska App. 2020).

Legislative review is not recommended.

AS 13.52.080(a)(3)

THE IMMUNITY PROVIDED TO HEALTH CARE PROVIDERS AND INSTITUTIONS IN AS 13.52.080(a)(3) IS LIMITED TO GOOD FAITH MISTAKES ABOUT AN INDIVIDUAL'S LEGAL AUTHORITY AS AN AGENT OR SURROGATE.

Bohn executed a Durable Power of Attorney for Healthcare, granting his parents authority to make medical decisions on his behalf if he became "incompetent or incapacitated." Bohn subsequently became incapacitated due to medical issues and was hospitalized. The hospital assumed decision-making authority over Bohn's medical care while he was incapacitated and treated him without his consent or that of his parents.

Bohn sued the hospital for violations of Alaska's Health Care Decisions Act.

The hospital argued that it was entitled to immunity under AS 13.52.080(a)(3), which provides that "[a] health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for . . . declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority." The hospital contended that it held a good faith belief that the patient's parents lacked authority to make medical decisions for him, based on the belief Bohn's parents were not acting in his best interests. The superior court granted summary judgment to the hospital, ruling that because the hospital's doctors had acted in good faith and in accordance with generally accepted medical standards, the immunity provisions applied.

The Alaska Supreme Court disagreed, and reversed the grant of summary judgment. The Court held that while a provider may decline to follow an agent or surrogate's instructions in other statutorily permitted contexts, the immunity provided in AS 13.52.080(a)(3) is limited to good faith mistakes about an individual's legal authority as an agent or surrogate. Therefore the Court found that the hospital's belief that Bohn's parents lacked authority because they were not acting in Bohn's best interest, even if held in good faith, exceeded the scope of protection offered by AS 13.52.080(a)(3). The Court reasoned that allowing a provider to decline to comply with a surrogate or agent's health care instructions under AS 13.52.080(a)(3) based on the provider's belief the agent or surrogate was not acting in the patient's best interest would functionally eliminate the role of agent or surrogate. The Court also noted that nothing in AS 13.52.080(a) grants immunity to providers that violate the prohibition on health care providers acting as surrogates themselves.

Bohn v. Providence Health Services - Washington, 484 P.3d 584 (Alaska 2021).

Legislative review is not recommended.

AS 14.11.100(j)(3)

THE REQUIREMENT THAT BONDS MUST BE REPAID IN APPROXIMATELY EQUAL PAYMENTS OVER A PERIOD OF AT LEAST TEN YEARS TO QUALIFY FOR SCHOOL DEBT REIMBURSEMENT REFERS TO THE BOND ITSELF AND NOT A SUB-COMPONENT OF THE BOND.

Alaska's school debt reimbursement program allows the Department of Education and Early Development (department) to reimburse municipalities for bond payments related to school construction and renovation. Under AS 14.11.100(j)(3), bonds must be repaid in approximately equal payments over a period of at least ten years to qualify for reimbursement.

The North Slope Borough (borough) sought reimbursement for bonds that did not comply with the statute's equal payments requirement. Specifically, the borough had pooled various projects into one bond, and school debt was just a portion of the bond. The school-related portions of the bond were spread out over ten years. The department denied the reimbursement, interpreting "bond" as used in AS 14.11.100(j)(3) to refer to the bond as a whole.

The Alaska Supreme Court affirmed the department's denial of reimbursement for the bonds. The Court opined that interpreting "bond" to refer to the bond itself, and not a sub-component of the bond, is the most natural reading of the statute. The Court held that the department's conclusion that the bonds at issue did not satisfy the statutory requirements was reasonable and was supported by the plain language of the statute.

N. Slope Borough v. State, 484 P.3d 106 (Alaska 2021).

Legislative review is not recommended.

AS 15.13.050(a)
AS 15.13.400(6)(A)

UNDER AS 15.13.050(A), AN ENTITY IS REQUIRED TO REGISTER WITH APOC BEFORE MAKING A PROMISE OR AGREEMENT THAT IS NOT CONTRACTUALLY BINDING.

A national political organization engaged an Alaska media consultant to reserve television advertising time prior to the 2018 gubernatorial primary. The organization did not register with the Alaska Public Office Commission (APOC), and did not report the reservations. APOC concluded that this conduct violated AS 15.13.050(a), which requires all entities to register with APOC before making any "expenditures," including promises or agreements to transfer something of value, to influence an election.

The organization appealed, arguing that APOC defined "expenditures" too broadly and that a promise or agreement requires all the elements of a valid contract. The organization therefore claimed that because its reservations were not legally binding contracts, it did not make any expenditures under AS 15.13.050(a). Considering the plain meaning and legislative history of the statute, the Alaska Supreme Court noted that it saw no evidence that the drafters only intended for the statute to apply to contracts. Accordingly, the Alaska Supreme Court held that the term "expenditure" includes promises or agreements that are not contractually binding.

Republican Governors Ass'n v. Alaska Pub. Offs. Comm'n, 485 P.3d 545 (Alaska 2021).

Legislative review is not recommended.

AS 15.13.070

AS 15.13.070 IS UNCONSTITUTIONAL AS APPLIED TO CONTRIBUTIONS TO INDEPENDENT EXPENDITURE GROUPS.

In 2012 the Alaska Public Offices Commission (APOC) issued an advisory opinion stating that the contribution limits in Alaska's campaign finance law are unconstitutional as applied to contributions to independent expenditure groups. Alaska's campaign finance laws differentiate between campaign contributions (payments to a candidate, political party, or other group for the purpose of influencing an election) and campaign expenditures (transactions that secure goods or services to influence an election). Expenditures can be either coordinated

or independent. An "independent expenditure" is one "made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate." AS 15.13.070(b) and (c) limit campaign contributions from individuals and groups to candidates, nongroup entities, groups, and parties.

In 2018 three individuals filed complaints with APOC alleging that independent expenditure groups had accepted contributions from individuals and groups in excess of the limits imposed by AS 15.13.070(b) and (c). APOC declined to enforce the contribution limits based on its advisory opinion.

On appeal, the Alaska Supreme Court concluded that in light of the United States Supreme Court landmark decision in *Citizens United v. Federal Election Commission*, which held that independent expenditures "do not give rise to corruption or the appearance of corruption," contribution limits to independent expenditure groups would not withstand even the lower level of scrutiny applied to contribution limits. The Court held that because limits on contributions to independent expenditure groups are unconstitutional, AS 15.13.070's contribution limits are unconstitutional as applied to contributions to independent expenditure groups.

Alaska Pub. Offs. Comm'n v. Patrick, 494 P.3d 53 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to amend the campaign finance provisions relating to contributions to independent expenditure groups in light of this decision.

AS 15.45.110(c)

IMPOSING A HARD CAP ON INITIATIVE PETITION CIRCULATOR COMPENSATION OF $1 PER SIGNATURE IS AN UNCONSTITUTIONAL RESTRICTION ON POLITICAL SPEECH.

Several entities opposed a decision by the lieutenant governor that a ballot initiative had enough signatures to allow the initiative to appear on the ballot. The entities alleged that ballot circulators who gathered signatures had been paid in excess of the amount allowed under AS 15.45.110(c), which

provides that "[a] circulator may not receive payment or agree to receive payment that is greater than $1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than $1 a signature, for the collection of signatures on a petition," and falsely certified that their compensation complied with Alaska election law.

The Alaska Supreme Court first reviewed the statute's plain meaning and legislative history and held that the $1 a signature limit is intended to be a hard cap on all types of compensation. The Court next considered whether the $1 a signature limit was an unconstitutional restriction on speech. The Court found that petition circulation is core political speech and that the $1 a signature limit burdens that speech. The Court recognized that while the state has a compelling interest in "ensuring the integrity of the election process and preventing fraud. . . . the means chosen to achieve the State's interests must be narrowly tailored." The Court found that AS 15.45.110(c) is not narrowly tailored because it "'does not leave alternative methods for payment available' to initiative sponsors." The Court also noted that the state has other, less burdensome ways of countering fraud, such as imposing criminal sanctions that specifically address "the potential danger that circulators might be tempted to pad their petitions with false signatures." For these reasons, the Court held that the $1 per signature limit, as a hard cap, was an unconstitutional restriction on core political speech. Because the $1 per signature limit was held unconstitutional, the Court also held that the lieutenant governor properly certified the petitions.

Res. Dev. Council for Alaska, Inc. v. Vote Yes For Alaska's Fair Share, 2021 WL 4006017 (Alaska Sept. 3, 2021).

Legislative review is recommended to review AS 15.45.110(c) in light of this decision.

AS 15.45.510

UNDER STATUTORY GROUNDS FOR RECALL, "LACK OF FITNESS" MEANS UNSUITABILITY FOR OFFICE, "INCOMPETENCE" MEANS LACK OF ABILITY TO PERFORM THE OFFICIAL'S REQUIRED DUTIES, AND "NEGLECT OF DUTIES" MEANS NONPERFORMANCE OF A DUTY OF OFFICE REQUIRED BY APPLICABLE LAW.

A recall committee submitted an application to the director of the division of elections seeking to recall the governor. Under AS 15.45.510, there are four grounds for recall of state officials: (1) lack of fitness, (2) incompetence, (3) neglect of duties, and (4) corruption. The application cited three grounds for recall—lack of fitness, incompetence, and neglect of duties —and made four different allegations of how those grounds were met. The director refused to certify the application, asserting that it was not legally or factually sufficient. The superior court granted summary judgment for the committee, deciding that except for one allegation, which it struck, the allegations in the committee's application were sufficient.

On appeal, the state argued that "fitness" should be limited to the official's physical and mental capacity to perform their official duties. The state asserted that "incompetence" should be limited to allegations that the official does not have basic knowledge or qualifications for the position or demonstrates incompetence through results. The state also argued that "neglect of duties" should be narrowly defined to require "either an allegation of the significance of the duty or an allegation that the omission had a tangible consequence...." However, the Alaska Supreme Court disagreed with the state and explained that, in the absence of legislative specificity, the Court would use the common meaning of the terms. The Court found that "lack of fitness" includes moral fitness and defined the term as "unsuitability for office." The Court concluded that "incompetence" means the "lack of ability to perform the official's required duties." The Court determined that "neglect of duties" means "the nonperformance of a duty of office established by applicable law." Therefore, under neglect of duties, the recall petition must only allege the existence of a duty and the official's failure to perform it to be legally sufficient. Using these definitions to consider the legal and factual sufficiency of the petition's allegations, the Court held that the committee's recall petition satisfied the legal requirements for presentation to the voters.

State v. Recall Dunleavy, 491 P.3d 343 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to narrow the statutory grounds for recall of state officials.

AS 16.05.835

REGULATION DEFINING "ANCHOR ROLLER" WAS NOT INCONSISTENT WITH STATUTE DEFINING "OVERALL LENGTH" OF A VESSEL.

Chaney was convicted of fishing with an overlength commercial salmon seine vessel in violation of AS 16.05.835. AS 16.05.835 limits the maximum overall length of a vessel participating in the salmon seine fishery to fifty-eight feet, and defines the "overall length" of a vessel as "the straight line length between the extremities of the vessel excluding anchor rollers." Because "anchor roller" is not defined by statute, and leaving the term undefined made it difficult to regulate the overall length of vessels, the Board of Fisheries adopted a regulation defining "anchor roller." It defined the term as "a device used solely in aid of deploying and retrieving anchor gear and does not provide any additional flotation, planing surface, sea keeping ability, buoyancy, deck space, or structural support to the vessel."

On appeal, Chaney argued that the definition of the term "anchor roller" in regulation is inconsistent with AS 16.05.835. He asserted that the statute expressly excludes an anchor roller from the overall measurement of a vessel, while the regulation does not, and contended that this makes the regulation inconsistent with the statute.

In considering Chaney's arguments, the Court of Appeals explained that devices "used solely in aid of deploying and retrieving anchor gear" are still considered "anchor rollers." Therefore, the court determined that the definition of "anchor roller" adopted by the board in regulation still excludes "anchor rollers" from a vessel's overall measurement. The court consequently found that the regulation was not inconsistent with the statute and concluded the regulation was reasonably necessary to implement that statute.

Chaney v. State, 478 P.3d 222 (Alaska App. 2020).

Legislative review is not recommended unless the legislature wishes to exclude other devices, such as devices providing additional flotation, planing surface, sea keeping ability, buoyancy, deck space, or structural support to the vessel, from the overall length of the vessel under AS 16.05.835.

AS 22.20.020
Alaska Code of Judicial Conduct Canon 3E

A JUDGE IS NOT DISQUALIFIED FROM PRESIDING OVER A CASE IF THE JUDGE PREVIOUSLY SERVED AS A PROSECUTOR FOR THE SAME AGENCY APPEARING BEFORE THE JUDGE; A JUDGE IS DISQUALIFIED IF THE JUDGE PREVIOUSLY APPEARED AS A LAWYER AT A HEARING IN AN EARLIER STAGE OF THE SAME CASE.

The defendant was convicted in two 2014 cases. Based on the defendant's convictions in these two cases, his probation was revoked in three prior municipal assault cases from 2006 and 2012. The defendant appealed, arguing that the judge presiding over all of his cases was required to recuse herself because she was the supervising prosecutor in the Municipality of Anchorage's domestic violence unit at the time of the defendant's 2006 assault cases and the judge represented the municipality as a lawyer during a hearing in the 2006 cases.

Under AS 22.20.020, a judge is not expressly precluded from presiding over a case where the judge served as a lawyer if the judge's service occurred more than two years before the judge's assignment to the case. Under Canon 3E of the Alaska Judicial Code of Conduct, a judge is required to recuse herself when the judge "served as a lawyer in the matter in controversy." The Alaska Court of Appeals relied on the judicial canon to interpret the disqualification statute and concluded that the judge's prior service as a municipal prosecutor, which ended four years before her assignment to the defendant's cases, did not require her disqualification from the defendant's current criminal cases and the probation revocation in the 2012 case. However, the court held that the judge was required to recuse herself from presiding over the probation revocation proceedings in the 2006 cases where the judge had previously acted as a lawyer.

Johnson v. Municipality of Anchorage, 475 P.3d 1128 (Alaska App. 2020).

Legislative review is not recommended unless the legislature wishes to allow judges to preside in cases where the judge previously served as a lawyer.

AS 23.10.055(a)(9)(A)

EMPLOYER MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT AN EXEMPTION TO OVERTIME PROVISIONS OF THE ALASKA WAGE AND HOUR ACT APPLIES; EXEMPTIONS EXPRESSLY LINKED TO FEDERAL FAIR LABOR STANDARDS ACT EXEMPTIONS MUST BE GIVEN A FAIR RATHER THAN NARROW READING.

An employee worked for a Texas corporation providing technology services to the oil and gas industry in Alaska. The employee subsequently sued the corporation in federal court alleging the corporation failed to pay overtime compensation in violation of the Alaska Wage and Hour Act (AWHA). The corporation contended that the employee was not entitled to overtime compensation because the AWHA exempts individuals employed "in a bona fide executive, administrative, or professional capacity" from overtime payment under AS 23.10.055(a)(9)(A). The federal court certified two questions to the Alaska Supreme Court: 1) what standard of proof applies to exemptions to the overtime provisions of the AWHA, and 2) should exemptions under the AWHA be given a narrow or fair interpretation.

The Court accepted the certified questions. Regarding the first question, the Court held that an employer must prove that an AWHA exemption applies by a preponderance of the evidence, reversing the Court's precedent that had applied the beyond a reasonable doubt standard.

As to the second question, the Court noted that in 2005, the legislature amended the AWHA to ensure the exemptions under AS 23.10.055(a)(9)(A) were defined and interpreted in accordance with the federal Fair Labor Standards Act (FLSA). The Court stated that recently, the United States Supreme Court gave the FLSA exemptions a fair reading rather than a narrow one. Because the U.S. Supreme Court's decision is binding on all courts applying FLSA rules, the Court concluded that AWHA exemptions expressly linked to FLSA exemptions must be given a fair rather than narrow reading. However, AWHA exemptions not expressly linked to FLSA exemptions should continue to be narrowly construed.

Buntin v. Schlumberger Tech. Corp., 487 P.3d 595 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to change the standard of proof for or the standard for interpretation of AWHA exemptions.

AS 23.30.012
AS 23.30.055

THE BOARD MAY APPROVE SETTLEMENT OF A WORKERS' COMPENSATION CLAIM THROUGH A SINGLE DOCUMENT THAT ALSO RESOLVES NON-WORKERS' COMPENSATION MATTERS; BOARD APPROVAL OF A SETTLEMENT AGREEMENT UNDER AS 23.30.012 DOES NOT TRANSMUTE FUNDS PAID FOR A CIVIL SETTLEMENT INTO WORKERS' COMPENSATION BENEFITS.

A worker died at a construction site. Neither the putative employer, who claimed the worker was an independent contractor, nor the property owner had workers' compensation coverage. Under AS 23.30.055, if an employer fails to secure workers' compensation coverage as required by the Alaska Workers' Compensation Act (Act), an injured employee, or the employee's legal representative in cases of death, may elect to either file a workers' compensation claim or a court action. AS 23.30.013(a) allows an employer and employee or beneficiary to reach an agreement in regard to a claim under the Act. The agreement must be approved by the Alaska Workers' Compensation Board (Board) under AS 23.30.013(b) if a claimant or beneficiary is not represented by an attorney.

The worker's mother, the personal representative of the estate, filed both a workers' compensation claim against the Alaska Workers' Compensation Benefits Guaranty Fund (Fund) and a wrongful death action against the putative employer and the property owner. At the Fund's request, the Board joined the putative employer, the property owner, and the worker's father as parties to the workers' compensation proceedings. All parties, except the putative employer, entered into a settlement agreement, using a single document to resolve both the wrongful death claim against the property owner and the workers' compensation claim. In the agreement, the estate elected the wrongful death suit and agreed to dismiss the workers' compensation claim, but preserved the wrongful death claim against the putative employer.

Because the worker's father was not represented by an attorney in the workers' compensation proceedings, the Board approved the settlement agreement as required by AS 23.30.012. The estate received a settlement payment from the property owner's insurer and dismissed the wrongful death claim against the property owner. The putative employer subsequently sought dismissal of the estate's wrongful death suit, contending that the estate could not pursue a wrongful death suit having elected, by virtue of its receipt of the settlement payment, to pursue a workers' compensation claim. The superior court decided that the Board's approval of the settlement transformed the settlement money into workers' compensation benefits and the estate could therefore not pursue a wrongful death suit against the putative employer.

The Alaska Supreme Court reversed the decision. The Court found that the settlement agreement was a global settlement in which the estate elected to pursue the wrongful death case and forgo any potential workers' compensation benefits. It stated that as a matter of policy, nothing was impermissible in a settlement encompassing both the wrongful death and workers' compensation claims. The Court concluded that the use of a global settlement agreement did not expand the Board's jurisdiction and determined that AS 23.30.012 only permits the Board to sanction agreements regarding workers' compensation claims. Therefore, the Board only had jurisdiction to approve the portion of the settlement agreement dismissing the workers' compensation claims. The Court held that the Board's approval of the settlement agreement under AS 23.30.012 did not transmute funds paid for the wrongful death claim into workers' compensation benefits. For these reasons, nothing in the Act prohibited the estate from continuing to litigate a wrongful death suit against the putative employer.

Seal v. Welty, 477 P.3d 613 (Alaska 2020).

Legislative review is not recommended.

AS 23.30.105(a)
AS 23.30.190

CLAIMS FOR IMPAIRMENT COMPENSATION UNDER THE ALASKA WORKERS' COMPENSATION ACT ARE SUBJECT TO A TWO-YEAR STATUTE OF LIMITATIONS.

Murphy injured his back while working for Fairbanks North Star Borough and filed a workers' compensation claim, including a request for additional permanent partial impairment compensation under AS 23.30.190. The Borough asserted, among other defenses, that the claim for additional impairment compensation was barred by the statute of limitations in AS 23.30.105(a). This statute provides, in relevant part, "The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement." It also provides that, "[I]f payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under . . . [AS] 23.30.190[.]"

The Alaska Workers' Compensation Board (Board) explained that in 1988, the legislature redefined the benefits in AS 23.30.190 from compensation for permanent partial *disability* to permanent partial *impairment*. The Board noted that the limitations period in AS 23.30.105(a) had long applied to permanent partial disability claims and that the statute expressly provides that voluntary payment of impairment benefits tolls the limitations period for a compensation claim. The Board therefore decided that AS 23.30.105 barred Murphy's impairment claim, concluding that the legislature intended to continue application of the two-year limitation period to permanent partial impairment benefits. The Alaska Workers' Compensation Appeals Commission (Commission) affirmed the Board's decision. While the Commission acknowledged that "disability" and "impairment" are distinct forms of compensation, the Commission interpreted AS 23.30.105(a)'s reference to AS 23.30.190 to mean that a permanent partial impairment claim must be filed within two years after the date of the last payment of impairment benefits.

The Alaska Supreme Court found that the statutory text was ambiguous. However, the Court determined that the legislative history of the statutes showed that the legislature intended the limitations period in AS 23.30.105(a) to apply to permanent partial impairment claims. The Court stated it could see no

policy reason to treat impairment differently from any other indemnity benefit for purposes of the statute of limitations and explained that applying the limitations period only to disability compensation or death benefits, with no limitations period on other nonmedical benefits, would create difficulties and increase litigation costs. Therefore, the Court held that the two-year statute of limitations under AS 23.30.105(a) applies to impairment claims.

Murphy v. Fairbanks N. Star Borough, 494 P.3d 556 (Alaska 2021).

Legislative review is not recommended.

AS 23.30.155(o)

INSURER HAS CONTINUING OBLIGATION TO CONSIDER NEW EVIDENCE AND MODIFY OR WITHDRAW CONTROVERSIONS BASED ON THAT NEW EVIDENCE; EVALUATION OF WHETHER INSURER HAS FRIVOLOUSLY OR UNFAIRLY CONTROVERTED COMPENSATION DUE UNDER THE ALASKA WORKERS' COMPENSATION ACT DOES NOT REQUIRE A SEPARATE FINDING OF BAD FAITH.

Vue was shot while working at a store and subsequently claimed workers' compensation benefits relating to PTSD. The employer contended that Vue was not disabled by PTSD and controverted the PTSD-related benefits. Under AS 23.30.155(o), the director of the division of workers' compensation is required to "promptly notify" the division of insurance if the Alaska Workers' Compensation Board (Board) "determines that the employer's insurer has frivolously or unfairly controverted compensation due under [the Workers' Compensation Act]." The Board found the employer had not unfairly or frivolously controverted benefits, and the Alaska Workers' Compensation Appeals Commission (Commission) affirmed the Board's decision.

On appeal, the Alaska Supreme Court discussed the three-step process used by the Commission to evaluate a controversion under AS 23.30.155(o): (1) the Board must consider whether a controversion was filed in good faith, considering only the evidence in the employer's possession at the time of the controversion, (2) if the Board determines that a controversion was not in good faith, the Board must then consider whether

the controversion was frivolous or unfair, and (3) if the Board decides that a controversion is frivolous or unfair, it must examine the motives of the controversion author to determine whether the controversion was made in bad faith. The Commission defines a "frivolous" controversion as one "completely lacking a plausible legal defense or evidence to support a fact-based controversion" and an "unfair" controversion as "dishonest, fraudulent, the product of bias or prejudice." Under the Commission's interpretation of AS 23.30.155(o), a separate finding of bad faith is required.

The Court held that an employer's insurer has a continuing duty to evaluate the evidence supporting a controversion and that it may be subject to a penalty if it fails to modify or withdraw a controversion after receiving evidence that removes the original basis for the controversion. The Court found that AS 23.30.155(o) does not mention bad faith—it requires a referral if the Board determines that the employer's insurer has frivolously or unfairly controverted compensation due under the Act. The Court concluded that the Commission exceeded its authority by expanding the statutory requirements and adding an element of subjective bad faith to AS 23.30.155(o). The Court reversed the Commission's decision, finding that the employer's controversions met the Commission's definition of "frivolous," because the controversions lacked sufficient evidence to support them.

Vue v. Walmart Assocs., Inc., 475 P.3d 270 (Alaska 2020).

Legislative review is not recommended unless the legislature wishes to change the standard for finding an employer has unfairly or frivolously controverted benefits.

AS 29.45.030(a)(9)

WASTE STRIPPING IS NOT EXEMPT FROM LOCAL TAXATION.

A mining company appealed the borough assessor's valuation of its mine, arguing the borough had improperly included the value of "capitalized waste stripping" when calculating the tax-assessed value of the mine. AS 29.45.030(a)(9) prohibits local governments from taxing "natural resources in place," which specifically includes "ore bodies." The mine owners argued that waste stripping—the process of removing worthless rock that sits on top of valuable ore—falls within this statutory exemption from taxation.

The Alaska Supreme Court found that all of the examples used for the term "natural resources in place" are limited to "deposits of valuable materials." Considering the plain text of the statute, the Court determined that "neither the overburden itself, nor the process of removing it, can be reasonably classified as a 'deposit of valuable materials.'" The Court concluded that waste stripping is not a "natural resource," but an improvement that makes it easier for miners to access natural resources. The Court held that the value of this improvement, like that of other improvements at the mine site, is subject to taxation.

Fairbanks Gold Mining, Inc. v. Fairbanks North Star Borough Assessor, 488 P.3d 959 (Alaska 2021).

Legislative review is not recommended unless the legislature wishes to exempt waste stripping from local taxation.

AS 31.05.030(a)
AS 31.05.060(a)

THE ALASKA OIL AND GAS CONSERVATION COMMISSION HAS JURISDICTION OVER WASTE DETERMINATIONS.

After gas leaked into Cook Inlet, French petitioned the Alaska Oil and Gas Conservation Commission (Commission) for a hearing. AS 31.05.030(a) grants the Commission jurisdiction over "all persons and property, public and private, necessary to carry out the purposes of" AS 31.05. Furthermore, under AS 31.05.060(a), the Commission must promptly set a date for a hearing when a petition is filed concerning a matter within the jurisdiction of the Commission.

The Commission denied French's hearing request by stating that it had "investigated the leak at the time it occurred," and concluded the leaking gas could not be waste. The Commission also stated that it is required to determine whether a leak is waste before it can exercise jurisdiction, because "[a]bsent waste, there is no waste jurisdiction." Because the Commission found that the gas was not waste, the Commission concluded that it had "no waste jurisdiction over [the] gas."

On appeal, the Alaska Supreme Court noted that the Commission's reasoning "puts the cart before the horse." The Court stated that the authority provided under AS 31.05.030(a) grants the Commission "jurisdiction over 'all persons and

property, public and private, necessary to' investigate and identify oil and gas waste." The legislature granted the Commission statewide jurisdiction over waste, but if the Commission is able to determine that there is no waste before it holds a hearing, then "the Commission could always undermine AS 31.05.060(a)'s hearing requirement by deciding the substantive issue behind closed doors and then disclaiming jurisdiction." Therefore, the Court held that the Commission has jurisdiction over waste determinations.

Moreover, the Court noted that "even assuming the Commission can deny a hearing because it previously investigated and decided a matter," there was no evidence in the record to support the Commission's claims that it had previously investigated whether this specific leak was waste. For these reasons, the Court concluded that French's request for a hearing was improperly denied and the case was accordingly remanded to the Commission with instructions to hold a hearing on the alleged waste.

French v. Alaska Oil & Gas Conservation Comm'n, 2021 WL 4006173 (Alaska Sept. 3, 2021).

Legislative review is not recommended.

AS 34.77.030(h)

APPRECIATION AND INCOME FROM A PROPERTY PLACED INTO A COMMUNITY PROPERTY TRUST DOES NOT ACCRUE TO THE TRUST UNLESS THE TRUST AGREEMENT EXPLICITLY STATES OTHERWISE.

A married couple transferred rental properties into a community property trust. The agreement did not declare appreciation and income of the properties transferred to the trust to be community property. When they divorced, the trial court awarded capital appreciation and income from property in the trust to the husband. The wife appealed, arguing that when property was transferred into the trust and declared to be community property, then the appreciation and income of that property were also community property.

AS 34.77.100(a) defines a community property trust as "an arrangement [in which] one or both spouses transfer property to a trust, the trust expressly declares . . . the property transferred is community property under this chapter, and at

least one trustee is a qualified person." In turn, AS 34.77.030(h) states: "Appreciation and income of property transferred to a community property trust is community property if declared in the trust to be community property."

The wife contended that the phrase "if declared in the trust" in AS 34.77.030(h) should be interpreted as modifying "community property" rather than "appreciation and income." But the Alaska Supreme Court rejected that interpretation. It instead found that the plain language made clear that the legislature intended the statute to mean that appreciation and income must be declared in the trust to be community property. Considering the legislative history of the statute, the Court looked to a sectional summary entered into the legislative record describing what is now AS 34.77.030(h) as operating to move appreciation and income into the community property trust "if the trust says they are" themselves property of the trust. The Court concluded that the legislative history of the statute supported an intent to defer to Alaskans on the content of their community property agreements. Given the plain language and legislative history of AS 34.77.030(h), the Court held that the trial court did not err in ruling that appreciation and income from the community trust properties were not community property.

Phillips v. Bremner-Phillips, 477 P.3d 626 (Alaska 2020).

Legislative review is not recommended.

AS 36.25.020

UNDER THE LITTLE MILLER ACT, A PERSON WHO PROVIDES WORK THAT IS "NECESSARY TO AND FORWARDS" A PROJECT SECURED BY A PAYMENT BOND MAY SUE FOR PAYMENT IN FULL ON THE BOND; NOTICE OF THE SUIT IS EFFECTIVE IF IT IS SENT VIA REGISTERED MAIL WITHIN 90 DAYS FROM THE LAST DATE OF LABOR.

An employee, Luong, worked for subcontractor Earth Stone, Inc. on a state public works project. Earth Stone provided work for the prime contractor, Pinnacle Construction, Inc. Luong's duties were mostly supervisory, but his work also included some physical tasks. When Luong stopped receiving consistent payment for his work, he sent Pinnacle a letter by registered and certified mail, requesting back wages. Pinnacle received the letter 94 days after the last date Luong provided labor on

the project. Luong subsequently filed suit requesting payment from Pinnacle's payment bond.

Under Alaska's Little Miller Act, contractors for public works must furnish payment bonds or sureties, and a person who furnishes labor or material in the prosecution of such a public work but is not fully paid may sue for payment in full on this bond. The claimant must give written notice to the contractor within 90 days from the last date of labor.

On appeal, the Alaska Supreme Court considered two issues of first impression regarding the Little Miller Act: (1) what constitutes "labor" under AS 36.25.020(b), and (2) whether the effective date of "notice" under AS 36.25.020 is the date of mailing or the date of receipt. The Court explained that the purpose of the Little Miller Act is to "protect persons who furnish labor or material for a state public works project from the risks of nonpayment," to assure that material and labor will be readily furnished for the state's projects. The Court stated that the value of this labor does not depend on how physically demanding it is, and held that "labor" under AS 36.25.020 includes all work that is "necessary to and forwards" the project secured by the payment bond. Inspections and supervisory work therefore qualify as "labor," in addition to physically-intensive tasks. The Court noted that performance of these tasks at the work site itself is not determinative.

The Court next found the Little Miller Act's notice provision concentrates on the claimant's actions. The Court stated that interpreting notice as effective upon mailing satisfies the 90 day deadline's specific purpose (allowing the prime contractor opportunity to make timely payments without risking competing claims from the subcontractor's employees and suppliers) and the statute's underlying purpose (protecting laborers and suppliers from the risks of nonpayment). The Court therefore held that notice under the Little Miller Act is complete once mailed to the contractor via registered mail.

Luong v. Western Surety Co., 485 P.3d 46 (Alaska 2021).

Legislative review is not recommended.

AS 40.25.120(a)(6)

RECORDS OF LAW ENFORCEMENT AGENCY'S INTERNAL INVESTIGATION CONSTITUTE RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES UNDER THE ALASKA PUBLIC RECORDS ACT; LAW ENFORCEMENT INVASION OF PRIVACY EXEMPTION APPLIES TO WITNESSES WITH SUBSEQUENTLY SUBSTANTIATED OR UNSUBSTANTIATED ALLEGATIONS.

The Department of Corrections (department) investigated and found unsubstantiated an allegation that a probation officer, Porche, was providing special treatment in return for sexual favors. Porche sought the investigation records, but the commissioner of the department denied his request based on AS 40.25.120(a)(6)(C), which states that a public records request may be denied if production of records compiled for law enforcement purposes could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness. Porche appealed to the superior court, which reversed the denial and ordered the records released on the basis that the allegation had not been substantiated. The superior court opined that to have a victim or witness in need of protection, a crime must have been committed. It concluded that no crime had been committed because the department determined that the allegations were not substantiated. Since there was no crime, there was no victim or witness in need of privacy protections.

On appeal, the Alaska Supreme Court found that records of a law enforcement agency's internal investigation constitute records compiled for law enforcement purposes under AS 40.25.120(a)(6). The Court next considered whether the records were shielded from disclosure under the invasion of privacy exemption under AS 40.25.120(a)(6)(C). The Court noted that the only term in dispute was the definition of a witness under this exemption. The Court explained that nothing in the statutory text, legislative history, or the common definitions of "witness" differentiate between a witness whose allegation or evidence is subsequently substantiated and one whose allegation or evidence is not. The Court reversed the superior court's order disclosing the department's records to Porche, holding that the superior court erred when it decided that because "there was no crime, there is no victim or witness." The Court concluded that because the department conducted its investigation for law enforcement purposes, the invasion of privacy exemption from disclosure applied.

Dep't of Corr. v. Porche, 485 P.3d 1010 (Alaska 2021).

Legislative review is not recommended.

AS 43.55.110(g)
AS 44.62.640(a)(3)

A NONBINDING DEPARTMENT OF REVENUE ADVISORY BULLETIN INTERPRETING THE OIL TAX CODE IS NOT A REGULATION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The Department of Revenue (department) issued an advisory bulletin interpreting the oil tax code under AS 43.55.110(g), which authorizes the department to issue nonbinding interpretive advisory bulletins "for the information and guidance of producers, explorers, and other interested persons." An oil producer brought suit against the department, arguing that the bulletin was a regulation that was not properly adopted under the Alaska Administrative Procedure Act (APA).

On appeal, the Alaska Supreme Court noted that AS 44.62.640(a)(3) defines "regulation" under the APA to include agency interpretations. The Court explained that an agency's interpretation is a regulation under the APA if it meets two criteria: (1) "the interpretation must 'implement, interpret, or make specific the law enforced or administered by the agency;'" and (2) "the interpretation must 'affect the public' or be 'used by the agency in dealing with the public.'" The Court concluded that the advisory bulletin is not a regulation because it does not satisfy the second part of the test, specifically the "bulletin does not affect the public, and the Department does not rely on the bulletin in its interactions." The Court noted that the legislature expressly authorized the department to issue advisory bulletins interpreting the oil production tax statutes and regulations, limited the bulletins in their ability to affect parties or be relied on by the department, and chose to allow the department to issue interpretations of oil tax statutes without going through the APA. For these reasons, the Court held that a nonbinding interpretive advisory bulletin issued under AS 43.55.110(g) is not a regulation under the APA.

Exxon Mobil v. State, 488 P.3d 951 (Alaska 2021).

Legislative review is not recommended.

AS 44.37.011(b)

A PARTY THAT ESTABLISHES INTEREST-INJURY STANDING IS ENTITLED TO APPEAL A DECISION OF THE DEPARTMENT OF NATURAL RESOURCES.

PLC holds an overriding royalty interest in a state oil and gas lease in the Ninilchik unit. The unit operator applied to expand a subset of that unit, which the Department of Natural Resources (DNR) approved. The lease area in which PLC holds royalty interests was included in the original application by the unit operator, but it was left out of the approved application. PLC appealed the decision to the commissioner of DNR (commissioner). Under AS 44.37.011(b), a person has standing to appeal a DNR decision to the commissioner if the "person is aggrieved by a decision of the Department of Natural Resources not made by the [C]ommissioner and is otherwise eligible to seek the [C]ommissioner's review of the decision. . . ." The commissioner found that PLC lacked standing and denied the appeal.

The Alaska Supreme Court held that by limiting standing to persons "aggrieved by" DNR decisions, the legislature allowed for the use of interest-injury standing. Therefore, determining whether a person is "aggrieved" by a DNR decision resembles a traditional standing inquiry. Using the framework of interest-injury standing, the Court found that DNR's decision adversely affected PLC's financial interests, which was sufficient to satisfy the statutory requirement that PLC be "aggrieved by" the DNR decision, and concluded that PLC has standing to appeal.

PLC, LLC v. State, 484 P.3d 572 (Alaska 2021).

Legislative review is not recommended.

AS 46.03.730
AS 46.03.900(19)

THE STATUTORY DEFINITION OF "PESTICIDE" IS NOT UNCONSTITUTIONALLY VAGUE.

Alleva applied a chemical agent known as "Zappit 73" along a public right of way. The labels on containers of Zappit 73 characterized the chemical as a "pesticide," "bactericide," and "algaecide," and warned that Zappit 73 was highly corrosive, could cause irreversible eye damage and skin burns, was toxic to fish and aquatic organisms, and if combined with organic matter or certain other substances, could produce hazardous gases.

AS 46.03.730 prohibits the spraying or application of pesticides "in a manner that may cause damage to or endanger the health, welfare, or property of another person, or in a manner that is likely to pollute the air, soil, or water of the state," without prior authorization from the Alaska Department of Environmental Conservation. In turn, AS 46.03.900(19) defines the term "pesticide" as "any chemical or biological agent *intended for* preventing, destroying, repelling, or mitigating plant or animal life and any substance intended for use as a plant regulator, defoliant or desiccant, including but not limited to insecticides, fungicides, rodenticides, herbicides, nematocides, and biocides" (emphasis added).

For spraying the public right of way with Zappit 73, Alleva was convicted of reckless endangerment under AS 11.41.250 and pollution of land, air, or water under AS 46.03.710. Alleva appealed his conviction, challenging the definition of "pesticide." He argued that the statutory definition is so vague that it deprived him of due process because the "intended for" language within the definition incorporates a subjective intent element without identifying who must hold the intent. More specifically, Alleva argued that the statute fails to clarify whether the corporate manufacturer, the individual user, or "some other person or entity" must intend for the product to be used as a pesticide in order for the product to qualify as a "pesticide" under the statutory definition.

The Court of Appeals rejected Alleva's argument. It found that the phrase "intended for" refers to the manufacturer's stated intent, not "the subjective intent of individual users or the speculative intent of some unknown and unknowable third party." The court determined that an ordinary person would know that Zappit 73 is a pesticide under Alaska law based on the warning labels attached to the product. Therefore, the court held that the statutory definition of pesticide was not unconstitutionally vague.

Alleva v. State, 479 P.3d 405 (Alaska App. 2020).

Legislative review is not recommended.

AS 47.30.705(a)

THE PROBABLE CAUSE STANDARD APPLIES TO DETENTION REVIEW HEARINGS; THE STATE MUST PROVE DETENTION IN JAIL IS THE LEAST RESTRICTIVE ALTERNATIVE AVAILABLE WHILE AN INDIVIDUAL AWAITS TRANSPORT TO A HOSPITAL FOR AN EMERGENCY MENTAL HEALTH EVALUATION.

Vern H. was detained in jail while awaiting an emergency mental health evaluation. AS 47.30.705(a) provides, in relevant part: "A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a . . . treatment facility." The superior court concluded that there was an established likelihood of Vern harming himself and that protective custody was necessary. The court found that being held in jail was necessary to protect Vern because he had no social supports in the community and there was no less restrictive alternative to jail while Vern awaited transport to the nearest available evaluation facility. The court ordered the state to communicate with a local health clinic, SEARHC, about holding Vern pending transport to the nearest available evaluation facility, and to put that information in a status report. The state did not follow this direction.

The Alaska Supreme Court held that due process requires that the probable cause standard applies to review hearings regarding an individual's continued detention. The Court also held that a person may be jailed while awaiting transport to a hospital only if the state shows by clear and convincing evidence that jail is the least restrictive available alternative. The Court opined that it is the state's burden to prove that detention is in the least restrictive available setting, and concluded that the state failed to meet its burden. The Court determined that reversal of the detention order was not an appropriate remedy for the state's failure to follow the superior court's continuing order that the state obtain evidence of SEARHC's availability as a less restrictive alternative to jail and affirmed the detention order.

Matter of Vern H., 486 P.3d 1123 (Alaska 2021).

Legislative review is not recommended.

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