Department of Law Monthly Report
February, 2009

Generally Speaking

Comings and Goings

Please welcome **Litigation Assistant Sherry Thomas** to the Anchorage Oil, Gas and Mining Section.

The Juneau Administrative Services Division bid farewell to **Accounting Clerk Marina Williams** who for the second year assisted the Collections and Support Unit with restitution payments. The division is hoping she will return again next year.

AAG Erin Pohland moved from the Anchorage Human Services Section to the Anchorage Labor and State Affairs Section.

In This Issue

Comings and Goings 1
Civil Division 1
Child Protection 1
Commercial and Fair Business 2
Human Services 4
Labor and State Affairs 5
Legislation and Regulations 5
Natural Resources 6
Opinions, Appeals and Ethics 7
Regulatory Affairs and Public Advocacy (RAPA) 8
Torts and Workers' Compensation 9
Criminal Division 10
Fairbanks DAO 10
Juneau DAO 11
Kodiak DAO 11
Office of Special Prosecutions and Appeals (OSPA) 12
Save the Date 13

Civil Division

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody after an infant ingested rat poison and the caregivers failed to provide appropriate medical attention. OCS determined after an investigation that the caregivers were not feeding the child appropriately and the child was malnourished. The family has a long history of child protection concerns.

OCS assumed emergency custody of a teenager after the local police department found that his mother was driving intoxicated. The teenager had been drinking with her and the two also allegedly participated in the commission of several illegal acts. The teenager has been in state's custody two other times.

OCS assumed custody of two children after their mother was arrested at a local store for shoplifting. It was revealed that the mother had also enlisted the children to help shoplift. After her release from jail, the mother could not be found and there was no one to care for the children. The father is incarcerated.

OCS had been providing services to a family for several years. Issues addressed included mental health issues and anger management. After an infant child presented at a doctor's appointment with unexplained burns, OCS was forced to assume custody. Attempts to find a relative placement to avoid placing the child in foster care were unsuccessful.

OCS assumed custody of three children after their mother was arrested and incarcerated and did not make adequate arrangements for the children. Upon further investigation, the children, whose father is also incarcerated, were found to be

medically neglected and in need of substantial medical treatment. Additionally, there was severe domestic violence in the home.

The Alaska State Troopers contacted OCS for assistance after they executed a search warrant on a home for drugs and found the home to be dangerous for children. Feces and urine was scattered throughout the house and drug paraphernalia was accessible to the children as were the drugs themselves. The father was arrested.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Commercial and Fair Business

State Participates in Multi-State Settlement

Alaska and 26 other states entered into an assurance of voluntary compliance with Coke, Nestle, and Beverage Partners Worldwide to settle energy-burning and weight-loss claims concerning Enviga, a green tea beverage. Promotional materials for Enviga included phrases such as "drink negative" and "the calorie burner" and claimed that the extra calorie-burning effect would result in weight loss. The claims were based, however, on a limited, short-term study of healthy, normal weight 18-35-year-olds, and there was no proof of actual weight loss or that similar results would apply to the general population. Respondents will pay $650,000 to the states and will include disclosures for Enviga or similar products that weight loss can only be achieved through diet and exercise. AAG Cynthia Drinkwater represented the state in this matter.

Alaska Supreme Court Affirms Regulatory Commission of Alaska

Alaska Exchange Carriers Association, Inc. v. Regulatory Commission of Alaska. The Alaska Supreme Court ruled that the Alaska Exchange Carriers Association (AECA) does not have a statutory right to intervene in a proceeding before the Regulatory Commission of Alaska, and that the commission did not abuse its discretion in denying AECA's request for permissive intervention.

The underlying proceeding before the commission involved a dispute between a local telephone company and two long distance telephone companies over the local company's requested relocation of the "first point of switching" at which the local company and the long distance companies hand-off in-coming and out-going long distance calls. AECA is the administrator of a tariff which defines the terms and conditions whereby long distance companies compensate local companies for their use of the local companies' facilities. However, AECA's tariff does not address the substantive grounds for resolving a dispute between a local company and long distance companies involving a requested relocation of the first point of switching.

The Alaska Supreme Court affirmed the commission's determination that the fact of AECA's tariff does not give it a statutory right to intervene in a first-point-of-switching dispute. The court also determined that the commission did not abuse its discretion in denying AECA's request for permissive intervention because the commission reasonably determined that AECA had not satisfied several of the elements required by the commission's procedural regulations to qualify for permissive intervention. AAG Robert Stoller represented the Regulatory Commission of Alaska in this matter.

Medical Board Rejects Administrative Law Judge Proposed Decision Regarding Independent Medical Evaluations

On February 2, the State Medical Board (Board) issued a decision rejecting the proposed decision of the administrative law judge (ALJ) and affirming its prior denial of Colorado physician Scott Emery's application for an Alaska medical license. In 2005, Emery, a neurologist, was hired by the defendants in a civil action to come to Alaska and perform an independent medical examination (IME) of an injured plaintiff. The plaintiff's attorney filed a complaint with the Division of Corporations, Business and Professional Licensing (Division) because Emery was not licensed in Alaska. Emery became aware of the investigation and filed an application for an Alaska medical license. On January 25, 2007, the State Medical Board denied his application, finding that his IME constituted the practice of medicine without a license. Emery requested a hearing to challenge the denial, which took place on July 23, 2007.

On November 17, 2008, Administrative Law Judge James Stanley issued a proposed decision, finding that Emery did not "diagnose" or "treat" the plaintiff, and therefore did not fall within the definition of the practice of medicine set out in AS 08.64.380(6)(A). Therefore, the administrative law judge recommended that Emery's application for licensure be granted. Pursuant to AS 44.64.060(e), on December 8, 2008, the division filed a proposal for action with the board, arguing that the ALJ misinterpreted AS 08.64.380(6)(A) and that Emery was in fact practicing medicine. The board agreed with the division, finding that Emery did diagnose and treat the plaintiff during the course of the face-to-face IME and therefore was practicing medicine. While the board affirmed its prior denial of the application, it also acknowledged that until 12 AAC 40.945 was adopted in 2008 (which provides that a physician performing a face-to-face IME is practicing medicine), its interpretation of AS 08.64.380(6)(A)with regard to IME's may not have been widely known. Therefore, the board concluded that if Emery wanted to re-apply, the board would consider the application on its merits, without treating its prior denial, or the unlicensed practice of medicine that gave rise to the denial, as a bar to approval. Former AAG Jenna Conley represented the division at hearing while AAG Robert Auth filed the proposal for action.

Medical Board Reprimands Doctor

Last month the State Medical Board slightly modified and then accepted an administrative law judge's proposed decision in a license application hearing involving William Sykes, MD. In his application for a license to practice medicine in Alaska Dr. Sykes failed to report eight states where he had previously held a medical license, but where he is no longer licensed. The board was willing to license Dr. Sykes so long as he accepted a reprimand for his failure to disclose these other states, and pay a fine. (The board reduced the fine imposed from $1,500 to $1,000.) If Dr. Sykes chooses not to accept these sanctions, his license will be denied. AAG Gayle Horetski handled the case.

Board of Accountancy Adopts Consent Agreement

On February 12, the Board of Public Accountancy (Board) adopted a consent agreement negotiated between the Division of Corporations, Business and Professional Licensing (Division) and Anchorage certified public accountant Barry Fowler wherein the board fined Fowler $1,000 and reprimanded him because, in one instance, he continued to advertise as a certified public accountant firm after the firm's permit expired, and, in another instance, he advertised and practiced as another certified public accountant firm before that firm obtained its permit to practice from the board. The agreement was reached after an accusation was filed by the division and a settlement conference was conducted by the Office of Administrative Hearings. AAG Robert Auth represented the division in this proceeding.

Alaska Division of Investments Settles Loan Deficiency Action

Mr. Hendricks obtained a loan from the Alaska Division of Investments (ADI) in 1990 in order to purchase an Area M fishing permit. The fishery was extremely strong during the period and remained so until 1996 or 1997 at which point the fishery began to decline and the Board of Fish actually had to limit fishing and even close the area for a number of years. This resulted in the value of these permits declining from $385,000 to under $24,000. Mr. Hendricks defaulted on his loan payments and in 2004 ADI repossessed the permit. The permit was not sold until 2007 when it was sold for $72,000. ADI immediately initiated the lawsuit to collect the deficiency of over $200,000. Mr. Hendricks defended the lawsuit by filing a counterclaim claiming that the decline in the value of the permit was due to actions of ADI, namely its lending program for fishing permits. He equated his situation to the current sub-prime mortgage situation. After considerable discovery and ADI filing a motion for summary judgment, the parties agreed to a settlement conference with Judge Joannides. At the settlement conference Mr. Hendricks agreed to pay ADI $115,000 cash. In return, ADI will release its security interest in his boat and also release the PFD assignments it has through 2017. AAG Mary Ellen Beardsley represented the ADI in this matter.

Human Services

Litigation Update

AAG Erin Pohland settled the *Elita S. Muhlenbruch* Medicaid provider audit appeal.

AAG Kimberly Allen and Section Chief Stacie Kraly continue to work on six separate cases related to the Personal Care Program, as well as changes to the Personal Care Attendant Program.

Child Protection Section Chief Carla Raymond and Human Services Section Chief Kraly signed the *Curyung* settlement agreement and will start working with the agency on implementing the terms of the settlement.

Section Chief Kraly settled the Imaging Associations of Providence Mat-Su facility matter. This settlement resolves a two-year-old dispute over whether the facility required a Certificate of Need. The settlement allows the facility to remain open with a conditional Certificate of Need supported by the department and Mat-Su Regional Hospital.

AAG Rebecca Polizzotto received a favorable decision from the Office of Hearings and Appeals. The provider was denied licensure because of a substantiated finding of abuse or neglect by the Office of Children's Services. The hearing officer ruled that the barrier crime statute was properly applied and upheld the decision of the agency to deny the license.

The section has a number of other hearings and superior court litigation cases in various stages of discovery and motion practice.

Medicaid

The third party liability team remains busy with over 900 open cases. Thirteen cases were resolved this month with $55,598.80 recovered. From January through February of this year, $114,628.79 has been recovered.

Other

AAG Jonathon Clement has taken over the Medicaid subrogation work for the section due to AAG Erin Pohland's move to the Labor and State Affairs Section.

Labor and State Affairs

Crime Lab Project

The Department of Public Safety and Municipality of Anchorage reached an agreement over the use of municipal property for a statewide crime laboratory. The state forwarded a signed lease to the municipality on February 27 and the Municipal Assembly will consider authorization to sign the agreement at its meeting on March 3. The negotiations for this agreement extended over a number of months. AAG Krista Stearns is assigned to this matter.

Education

K.R. v. State. The state reached agreement with the Disability Law Center in this case. Under the agreement, the Department of Education and Early Development will inform the Municipality of Anchorage that state policy does not prevent the Anchorage School District from bussing children to the State School for the Deaf. Also, the department will amend the operating agreement for the school to provide that the Anchorage School District is the proper respondent for due process hearings. The Disability Law Center will dismiss its Ninth Circuit appeal. AAGs Rachel Witty and Neil Slotnick worked on this case.

Elections

Republican Party v. Division of Elections. In this case, the Republican Party withdrew its appeal from the division's determination that Chris Tuck was eligible to run for office using this name. The party filed the lawsuit against the Division of Elections after Mr. Tuck won his seat in the November general election. The basis for the challenge was the fact that the candidate's legal name is Christopher Mestas, although he has used the name Tuck for many years. AAG Sarah Felix represented the division in this case.

Croft v. Parnell. AAG Mike Barnhill filed the state's brief this month with the Alaska Supreme Court in this case. The issue is whether a ballot measure initiative can combine a revenue measure—here, an oil tax—with an administrative program—here, a system to publicly finance elections. The Lieutenant Governor concluded that combining these unrelated measures violated the single subject rule for legislative matters and declined to certify the initiative proposal. Superior Court Judge Rindner agreed and the initiative supporters have appealed the superior court decision to the supreme court.

Motor Vehicles

Sonja Alvarez v. State. On February 11, AAG Krista Stearns argued on behalf of the Division of Motor Vehicles before the Alaska Supreme Court in this case (a driver's license revocation appeal). At issue is the delay between the citation and the hearing on the license revocation. The Division of Motor Vehicle's position is that the delay was reasonable. Ms. Alvarez had asked to have the officer present at the hearing and the officer was absent from the state for military service. The case was delayed until the officer's return. The court took the matter under advisement.

Special thanks to AAGs Toby Steinberger and Rachel Witty for covering the Department of Labor and Workforce Development during the transition before AAG Erin Pohland's start date with the section. Special thanks also to Paralegal Jean Clarkin and AAG Krista Stearns for their work assisting with unpaid penalty collections for the Alaska Public Offices Commission and the Division of Workers' Compensation.

Legislation and Regulations

During the month the section worked on legislation and administrative order drafting for the Governor's Office. Additionally, the section edited and legally approved for filing the following regulations projects: 1. Medicaid (eligibility review period and

continuous eligibility for Medicaid); 2. Department of Commerce, Community, and Economic Development (minimum interest rates for fisheries enhancement loans; minimum interest rates for commercial fishing loans); 3. Board of Fisheries (Arctic-Yukon-Kuskokwim Region reorganization of sport fisheries; associated regulations; Prince William Sound Area subsistence and commercial finfish and shrimp fisheries and Cook Inlet subsistence fisheries); 4. State Board of Education and Early Development (public school library collection development grants); 5. Board of Dental Examiners (denial of licenses).

Natural Resources

Hakala v. CFEC. On February 10, Sitka Superior Court Judge David George issued an opinion affirming the Commercial Fisheries Entry Commission's (CFEC) denial of a Northern Southeast Sablefish Longline limited entry permit to Ronald Hakala. The sole issue in this case was whether Mr. Hakala was entitled to extraordinary circumstance points for the qualifying year of 1984 when he claimed he was prevented from fishing due to an injury.

The CFEC may award participation points for a given year if the fisher was prevented from participating in the fishery that season by an extraordinary circumstance. The fisher must prove that the fisher: 1. had a specific intent to participate that season, 2. was prevented from participating in that season due to an extraordinary circumstance, and 3. made all reasonable efforts to participate despite the extraordinary circumstance.

The court concurred with the state that Mr. Hakala failed to sustain his burden proof as to each element. The only evidence presented by Mr. Hakala that he satisfied the three elements of a claim for extraordinary circumstance points were his own unsupported statements, and an affidavit from a fellow fisher who had no contact with Mr. Hakala between June 1984 and January 1985 and thus could offer only speculation. All medical evidence in the record indicated the injury was minor.

Therefore, the court affirmed the CFEC's decision that Mr. Hakala had failed to sustain his burden of proving that he should be awarded extraordinary circumstances points for 1984. AAG Tom Lenhart represented the state in this matter.

AAG Steven Daugherty and Senior AAG Lance Nelson had a busy month on the fisheries front:

***Jensen v. Gutierrez, et al.*, No. 3:08-CV-00286-TMB.** The state filed a motion to dismiss and a reply to plaintiff's opposition to the motion in this case. The plaintiff, Herbert Jensen, a drift and seine salmon fisherman from Cordova, argues that state management of salmon fisheries is preempted by the Magnuson-Stevens Act and seeks to subject all state salmon fisheries to federal oversight. He also specifically seeks to eliminate all state personal use fisheries and the Prince William Sound Management and Salmon Enhancement Allocation Plan.

***Alaska Fish and Wildlife Conservation Fund and the Chitina Dipnetters Association, Inc. v. State*, No. 4FA-09-96601.** The state also filed an answer in this case which seeks to overturn a 2003 determination of the Alaska Board of Fisheries finding that the Chitina dip net fishery does not satisfy the board's criteria adopted under the state's subsistence law for customary and traditional subsistence use. That case further seeks to overturn the board's adoption of eight criteria for making customary and traditional use determinations.

AAG Daugherty also attended a 10+ day regulatory meeting of the Alaska Board of Fisheries in Sitka where Southeast Alaska Finfish issues were considered.

Opinions, Appeals & Ethics

Ethics and Public Records Requests

AAG Judy Bockmon addressed a variety of informal ethics inquiries by email and phone, and is working on four complaints and several other preliminary investigation reviews. She issued an advisory opinion letter to a former employee earlier this month and is currently finishing another. She is waiting for additional information from the involved state officer on the previously reported advisory opinion for a board ethics supervisor.

AAG Judy Bockmon also continues work on draft regulations related to the personal use of electronic equipment and other needed amendments and associated documents as time permits. She presented ethics training this month to a joint meeting of the members of the Alaska Workers Compensation Appeals Commission, the Alaska Workers Compensation Board and the Alaska Labor Relations Agency.

AAG David Jones continued to assist the Governor's Office with responses to the many pending public records requests. To expedite responses to those requests, eight people were recruited from other sections in the Civil Division to help review the records for privileged information. The section is enormously grateful to Paralegals Molly Benson, Gretchen Knapp, Pam Post, and Lori Yares, and AAGs Jonathan Clement, Jennifer Currie, Steve DeVries, Bob McFarlane for helping out.

Appeals

***J.S. v. State, OCS*, S-13257.** AAG Dave Jones submitted a brief to the Alaska Supreme Court in a father's appeal challenging the termination of his parental rights to his daughter. The daughter has been in the state's legal custody since she was nine months old and has been in her current foster home since August 2006. The father was in jail or a halfway house for 22 of his daughter's first 42 months of life and was voluntarily out of contact with her for an additional six months during that period. A psychologist testified that the lack of stability in the daughter's first two years of life caused her significant mental harm. On appeal, the father claims, among other things, that the trial court should not have concluded that his daughter was a child in need of aid or that the Office of Children's Services made adequate efforts to keep the family together.

***Jeremy S. v. State, Office of Children's Services*, S-13066.** AAG Mike Hotchkin represented the state in a father's appeal from a trial court order terminating his parental rights. The state supreme court affirmed the trial court's order by an unpublished Memorandum Opinion and Judgment. The case was decided under the state Child in Need of Aid statutes and the federal Indian Child Welfare Act.

While the father challenged all of the trial court's findings, his main claims were that he had never done anything bad in his child's presence and that the state's petition to terminate parental rights after working with the family for only eight months was filed too early. The father claimed that he had made some progress in treatment, and he argued that the state had a duty to attempt to reengage him in treatment after he stopped participating.

In affirming the trial court's finding that the father's conduct had placed the child at risk of harm, the supreme court continued its recent trend of examining a parent's conduct holistically (for example, considering how a parent's behaviors involving substance abuse might result in the parent's absence from the home or might otherwise place a child at risk of physical or mental harm, in addition to determining whether the parent's habitual or addictive use of substances has substantially impaired the parent's ability to parent, as required by the substance abuse-specific subsection of the child-in-need-of-aid statute). The court reiterated its holding from several recent cases that a parent need not act abusively in a child's presence in order for a

trial court to find that a child entrusted to the parent's care would be at risk of harm based on the parent's history of domestic violence, substance abuse and incarceration outside of the child's presence.

The court rejected the father's other claims by noting that (1) while the father may have made some progress in treatment, he did not complete programs mandated by his case plan and by court order, and his treatment provider testified that the father had made minimal progress at most, (2) a court may consider a parent's lack of willingness to participate in treatment in evaluating OCS's efforts toward the parent, (3) OCS is not required to wait until a child suffers harm to take action to protect the child, and (4) the 15 month period during which OCS may work to reunite a family before the statute requires it to petition for termination of parental rights is a maximum period, and in appropriate cases OCS may petition for termination before the period has run; in its analysis the court cited the legislative pronouncement that it is important for children in foster care to achieve permanent placements expeditiously.

Regulatory Affairs and Public Advocacy (RAPA)

Pre-Filed Testimonies

U-08-61, Fairbanks Natural Gas exemption. On June 6, 2008, the Regulatory Commission of Alaska (RCA) opened a proceeding to investigate Fairbanks Natural Gas, LLC's (FNG) exemption from rate regulation in response to an inquiry from certain members of the Alaska State Legislature. The Attorney General/RAPA pre-filed the direct testimony of its two witnesses on October 31, 2008. Those initial testimonies concluded that: FNG did not appear to be over-recovering gas utility revenues; the Fairbanks heating oil market is competitive and many commercial customers have the ability to inexpensively switch fuels between gas and heating oil; but FNG's small share of the residential heating market involves captive customers who require some price protection.

The Attorney General/RAPA filed the reply testimony of its contract witness, economist C. Klein, on January 26. Her testimony again concluded that the price of fuel oil should be the price cap for FNG's *residential* gas customers, and that the commission should revisit the question of rate regulation of FNG if its overall market share reaches 25 percent of the Fairbanks heating market. The parties have since discussed settlement terms consistent with RAPA's advocacy in the case.

U-08-63, Potter Creek Water Company. On April 2, 2008, Potter Creek Water Company (PCWC) filed to increase rates by 121 percent for water service to its (approximately 120) customers in south Anchorage. The owner, Neil Bergt, had previously attempted to sell the utility. The Potter Creek Homeowners' Association intervened in the rate case.

On January 30, the Attorney General/RAPA pre-filed the direct testimony of staff witness Janet Fairchild. Among other things, the Fairchild testimony questioned various affiliated transactions for ratemaking purposes, including the proposed land lease payment amount for reservoir use of land owned by the utility owner. Her overall analysis resulted in support for a 6 percent rate increase, and a recommendation for a dividend restriction on the utility because of equity diminution primarily attributable to lease payments made by the utility to its affiliate. PCWC's reply testimony is due to be filed on March 9.

Pleadings Filed

U-08-157 & 158, Anchorage Water and Wastewater Utility. On November 14, 2008, the Anchorage Water and Wastewater Utility (AWWU) requested a permanent rate increase of 7 percent for water services and a rate increase of 6.5 percent for sewer services. At the utilities'

request, the commission granted interim, refundable rate increases in the same amounts.

On January 28, the Attorney General/RAPA filed a conditional objection to AWWU's proposed handling of interim refundable receipts, as a result of which the commission rejected the utilities' proposed election to establish an informal escrow account.

On February 5, the Attorney General/RAPA filed a motion to consolidate docket U-08-136, AWWU's petition to lift dividend restrictions, with the subject rate cases because the interrelated questions of law and fact require a coordinated analysis of the respective cases. The utility filed its opposition on February 17 and a commission decision is pending.

U-07-78, Goat Lake Hydro, Inc. reconsideration. Goat Lake Hydro, Inc. (GLH) is a wholesale power producer of hydroelectric power near Skagway that sells all of its power to its regulated affiliate, Alaska Power Co. GLH proposed a KWh increase to 'true-up' its rate stabilization account. An adjudicatory hearing was conducted on November 14, 2008 and the commission issued an order approving the rate increase on January 30.
The Attorney Genral/RAPA filed a timely petition for reconsideration of order No. 8 on February 17. The petition asserts that the order is based upon erroneous facts, unlawfully modifies a commission-approved stipulation between the parties in a derivative rate case, and ignores controlling precedent and established ratemaking principles. A commission decision is pending.

New Case

U-09-06/07/08, Alaska Power & Telephone Company. On December 5, 2008, three local exchange telephone companies owned by Alaska Power and Telephone Company (AP&T) filed for a 12 percent rate increase for local telephone service. The three local companies, Alaska Telephone Company, Bettles Telephone Inc., and North Country Telephone, Inc., are operating under a unified rate structure and common tariff. Responsive to Regulatory Commission of Alaska invitation, the Attorney General/RAPA filed notice of election to participate in the case on February 3. A procedural schedule has not yet been set.

Torts and Workers' Compensation

The superior court dismissed all claims against the Attorney General's Office-represented clients in a case where the pro se litigant, Tommie Patterson, sued an Assistant District Attorney and the District Attorney's Office under 42 U.S.C sec. 1983. During his 1982 criminal trial, Patterson's hair sample evidence was described as "negroid" by an expert witness on forensic hair samples, and the prosecutor's in-court questions and statements relating to the forensic evidence also referred to the classification. Patterson filed suit, alleging that the use of the word "negroid" was an unconstitutional racial epithet. The trial court dismissed all claims against the state defendants, finding that the claims were not yet cognizable because Patterson had not shown that his criminal conviction was reversed or invalidated (a requirement imposed before civil lawsuits against a criminal defense attorney will be heard); that any claims that had accrued were untimely; that the District Attorney's Office is an arm of the state that cannot be sued under § 1983, and that an Assistant District Attorney has absolute immunity from suit based on her in-court statements while prosecuting a case. The state defendants were represented by AAG Ruth Botstein.

The superior court dismissed all claims against the Public Defender Agency and several Assistant Public Defenders in a *pro se* lawsuit that alleged legal malpractice. The court dismissed all the core legal malpractice claims brought by plaintiff Richard Grove without prejudice, holding that no malpractice claims accrued unless and until the underlying criminal conviction was reversed or invalidated. Initially, however, the court allowed Grove to proceed on claims of negligent supervision by the agency and supervising

attorneys. The defendants successfully moved for reconsideration; the court then agreed that the negligent supervision claims, like the core malpractice claims, could not go forward unless Grove's criminal conviction was invalidated or called into question on direct appeal or a claim for post-conviction relief. Chief AAG Gail Voigtlander and AAG Ruth Botstein worked on the case.

In *DeNardo v. Maassen, et al.*, frequent pro se litigator Dan DeNardo sued his former landlords, their attorneys, and a superior court judge who dismissed an earlier case that DeNardo brought against the same landlords and attorneys. The trial court granted summary judgment to all defendants, and because of the vexatious nature of DeNardo's suit, issued a pre-litigation screening order that required DeNardo to meet three requirements before he could sue any of these defendants in the future. DeNardo appealed. In the January 30, 2009 opinion, the Alaska Supreme Court affirmed the trial court's grant of summary judgment (and found that DeNardo had waived any argument about the award of attorney's fees).

With respect to the pre-litigation screening order, the Supreme Court agreed that the lower court did not abuse its discretion in finding that DeNardo qualified as a vexatious litigant, or in issuing a screening order. The Supreme Court affirmed the order's requirements that, before filing a new complaint against any of the same parties again, DeNardo must demonstrate two things:

1. The complaint does not restate a cause of action that has already been asserted or could have been asserted in a prior case against the same parties; and 2. The complaint is definitive, detailed, and legally sufficient to survive a motion to dismiss. However, the Court struck the third requirement in the pre-litigation screening order, that DeNardo submit proof he has paid any court-ordered sanctions and awards of attorney's fees and costs owed to the defendants named in the new complaint, because it was overly restrictive of DeNardo's right to access the courts and the other two requirements adequately protect the defendants.

Several other pre-litigation screening orders, of broader application, have been issued in other superior court cases involving DeNardo, at least two of which are incorporated into final judgments that have not been appealed. This matter was defended by Senior AAG Susan Cox.

Criminal Division

Fairbanks DAO

A 43-year-old Fairbanks man associated with the Hell's Angels received a sentence of 17 years in prison with 2 years suspended (15 years to serve) after having been convicted of manslaughter at trial late last year. The defendant had been charged with second degree murder. At trial he admitted to having killed the victim but claimed he did so in self-defense. Evidence was developed tending to indicate that the victim had a quick temper, and post mortem analysis indicated that he was under the influence of methamphetamine at the time of his death. The victim had been stabbed in his home and bled to death after the defendant and two others fled the scene. In his sentencing remarks Judge MacDonald said "there was no need to kill [the victim], there was a door right behind you". The judge expressed little hope for the defendant's rehabilitation, noting his 20 year history of "habitual lawlessness". As a sad aside, the victim had been killed seven months after his son, also a drug user, had been shot to death. The son's killer is currently serving a 30 year prison term.

A 34-year-old North Pole woman was sentenced to five years with two years suspended after having been convicted of vehicle theft in the first degree. The victim reported having left her car running while she quickly slipped into a convenience store. When she came out a few minutes later, her car was gone. North Pole

Police quickly responded to the victim's report, and radio dispatched descriptive information about the stolen car to all officers on the road. Within a few minutes a Fairbanks Police Officer responded that he had located the car and had taken the driver into investigative custody. The defendant had prior felony convictions for theft and forgery.

A 62-year-old Delta Junction man was sentenced to 20 months in jail with 16 months suspended following his conviction for felony driving under the influence. This man came to the attention of authorities after his wife made a REDDI (Report Every Drunk Driver Immediately) call to the police, saying her husband had just left their house intending to drive to the liquor store, and that he was already intoxicated. When the trooper responded to the named liquor store, he found the defendant's van running and found the defendant inside the store purchasing alcohol. The defendant admitted to having driven to the store. After failing all field sobriety tests the man was arrested for driving while intoxicated, and blew a .178 percent onto the Datamaster breath test machine. A review of the defendant's criminal history showed that he had prior convictions for driving under the influence in 2003 and 2006.

During the month the Fairbanks grand jury returned indictments on 13 other felony driving under the influence felony cases, including three defendants indicted for getting a new driving under the influence after having been prior convicted for a felony driving under the influence, making the new charge a felony as well.

Driving under the influence prosecutions continue to be a very large component of the Fairbanks' caseload.

Juneau DAO

During February, Juneau DA Doug Gardner tried a two-victim sexual abuse of a minor in the second degree sexual contact case against defendant Larry Berryhill. Berryhill was represented by local attorney Louis Menendez. Berryhill was accused of three counts of sexual abuse of a minor in the second degree involving sexual contact by a person in a position of authority. The state only called two witnesses at trial – the two boys that National Collegiate Athletic Association pole vault coach Berryhill, formerly of Brigham Young Univeristy, gave "full body massages" to when they were 15-years-old. The massages were given to the victims by the defendant as a part of their summer training program.

The case originated in 2006, where the two victims were serving as "lodge boys" at the defendant's fishing lodge. One victim testified that the defendant pulled his genitals out of his underwear during a "full body massage". The case was investigated by Alaska State Troopers Sgt. Steve Hall of Juneau and Sgt. Michelyn Grigg of Alaska Bureau of Investigations, Palmer. The defendant called former members of the Brigham Young University pole vault team who testified about their very different experiences at the lodge over the state's objections. The jurors found the pole vault team unpersuasive and convicted.

Other than the Berryhill trial, the office has been busy screening and taking to grand jury more sexual abuse of minor and sexual assault cases. The next four months will be busy in Juneau.

Kodiak DAO

The criminal law business has remained steady in Kodiak during the month of February.

An 18-year-old Kodiak High School student was indicted for possession of marijuana on school grounds.

Police arrested a 20-year-old female felony probationer and charged her with attempted sexual abuse of a minor in the second degree. The probationer is alleged to have engaged in a

sexual relationship with a 12-year-old girl. The child's father had obtained a restraining order prohibiting contact between the minor and the defendant. Police acting on a tip from a citizen conducted surveillance observing the defendant pick up the minor from near the school and then take her to a remote area to park. Officers intervened while the defendant was in the back seat on top of the girl.

At the end of the month, a Kodiak massage therapist pleaded guilty to three consolidated counts involving six victims charging sexual assault in the third degree for engaging in sexual contact with victim's who were incapacitated. Sentencing will be held in the next 30 to 60 days.

During the month, acting Superior Court Judge Peter Ashman has been holding meetings with local stake holders to explore the possibility of setting up a therapeutic court in Kodiak.

Office of Special Prosecutions and Appeals (OSPA)

Rural Prosecution Unit

Rural Prosecution Unit attorneys have been busy handling the case load of an attorney who is out of the Bethel office on leave to prepare for the bar examination. Attorneys rotated through the Bethel office screening cases, assisting with the daily calendar, and consulting with other attorneys in the office about their pending cases. They also traveled to Barrow and Kotzebue during the month and handled numerous superior court arraignments, bail hearings, and omnibus hearings telephonically from their offices in Anchorage.

In early February, Elija Rock was convicted in Kotzebue after a jury trial of two counts of sexual assault in the first degree for incidents occurring in Point Hope. Sentencing will be set for later this spring. ADA Dwayne McConnell is handling this case.

Jerry Kaleak was sentenced in Barrow to 33 1/2 years to serve for sexual assault in the first degree and burglary in the first degree. Kaleak had been convicted after a court trial in Barrow last September for an incident that originated in Point Lay. ADA Dwayne McConnell handled this case.

ADA June Stein spent the first week of the month in Kotzebue filling in for ADA Angela Jamieson who was on vacation. ADA Stein spent the second week of the month covering cases in Bethel. During both weeks she screened many cases, handled court hearings, and extended offers resolving cases. ADA Stein is also continuing to prepare for the Abbott quadruple homicide trial which occurred in Sitka.

Patrick Tickett was indicted for murder in the second degree, assault in the first degree, and misdemeanor DUI after operating a snow machine in November 2008 that crashed into a dog sled resulting in the death of Dr. Roger Gollub and the serious injury of Tracy Schaffer. ADA Gregg Olson is handling this case.

Jonathan Kashatok pled guilty to murder in the second degree for the October 2007 beating death of his wife, Angelina Hapoff in Bethel. Sentencing is set for March 20, 2008. ADA Gregg Olson is handling this case.

Wilfred Murphy pled guilty to murder in the second degree for the February 2008 shooting death of Allen Okitkun. Sentencing will occur later this spring. ADA Dwayne McConnell is handling this case.

Twenty-three-year-old Kay Atti was sentenced to a composite sentence of 45 years in jail with 25 years suspended and 20 years of probation for three counts sexual abuse of a minor in the second degree. Atti had been indicted for numerous incidents of sexual abuse of young boys in Bethel and villages near Bethel. The assaults occurred in the four years following his sixteenth birthday.

SAVE THE DATE

NAAG Spring Meeting - Washington, DC
March 2-4