IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ALEXIE WALTERS,	)
	)
Defendant,	)
	)

Case No. 4SM-17-00081CR

DECISION AND ORDER GRANTING MOTION FOR CONTINUANCE AND DENYING MOTION TO DISQUALIFY

I. INTRODUCTION

Less than a week before the start of a long set trial in this case, the attorney for the defendant filed a Motion to Continue based on the attorney's leaving the Public Defender Agency. The State opposed the motion and asked the court to compel the withdrawing attorney to continue in the case. Because the withdrawing attorney is unable to continue in the case, the continuance must be granted. Because notice of the pending withdrawal was not timely given to the State, and because, as a result, the State suffered significant prejudice, withdrawing counsel and the agencies were each admonished. Based on this admonishment, the agency sought to disqualify the court. Because the court's ruling directly flows from the contested motion in this case and because it was not delivered in a manner that

suggested a bias against the agency, the motion to disqualify is denied.

II. FACTS AND PROCEEDINGS

The defendant was indicted for Murder in the First Degree, Murder in the Second Degree, Assault in the Third Degree, and Tampering with Physical Evidence on October 12, 2017. The Public Defender Agency, through attorney Amanda Harber, entered an appearance in this case on that same day. The case was assigned to Superior Court Judge Peters. The defendant filed a peremptory challenge against Judge Peters. The case was assigned to Superior Court Judge McConnell.

The case proceeded through the pretrial stage in the customary fashion, the parties working through the exchange of discovery and investigation. In the summer of 2018, Judge McConnell retired. The case was later reassigned to his successor, Judge Haas. The State filed a peremptory challenge against Judge Haas in January of 2019 and this case was assigned to this court.

An Omnibus hearing was held March 15, 2019 and the case was set for trial the week of July 22, 2019. The State requested and the court issued a certificate to secure the attendance of an out-of-state witness. Another Omnibus hearing was held on May 14, 2019. A substitute attorney was filling in and, on behalf of

the defendant, asked to continue the Omnibus hearings because of continuing negotiations. The State noted that if a month-long continuance of the trial was needed, the State would not object. Substitute counsel was not able to take a position on anything beyond requesting a continuance of the omnibus hearing.

Another Omnibus hearing was held on June 26, 2019. At that hearing Ms. Harber appeared and requested a continuance of the trial. The State's attorney opposed the continuance on the grounds that arrangements for the out-of-state witness were complete and the witness was prepared to appear at the scheduled trial time. The State also noted that the State's offer had expired; that there were no communications regarding any offers; and that the case was ready for trial. The State asked the court to leave trial as scheduled.

Ms. Harber stated that she was in fact available at the scheduled trial week but that, with coworkers leaving, her reassignment to Kenai from Bethel, and her other caseload she needed more time to handle her professional responsibilities. At that time she also indicated that perhaps there would be grounds for filing a motion challenging the grand jury indictment for murder in the first degree.

The court denied the request for the continuance holding that good cause was not established. Because of counsel's

familiarity with the case and the age of the case, it was important for the case go forward. There was no reason to believe on the record that defense counsel would not have been effective in handling the case.

On July 1, 2019, Ms. Harber gave the Public Defender Agency notice of her resignation, to be effective July 15, 2019. Based on her departing, Ms. Harber filed a motion to continue the trial. The motion was signed on July 12, 2019. It was not received by the court or the State until July 15, 2019. Calendar Call was scheduled for July 16, 2019. Ms. Harber was not present for the calendar call as she was no longer an employee of the Public Defender Agency. The State, without notice of the pending resignation and withdrawal, continued to prepare for trial at great lengths in the time period between July 1st and July 15th.

The State opposed the motion to continue. The State pointed out that this case has been pending with the same counsel since October 2017; that at the March 15, 2019 Omnibus hearing, the case was set for trial the week of July 22nd and no parties objected; and that the court has continued this case a total of 15 times at the request of the defense.

Importantly, the State pointed to the great prejudice that it suffered because of failure to receive notice of the pending resignation. The State had lost its attorney in this case,

Bethel District Attorney Wallace, because of his appointment to the bench. The State put together a new prosecution team and that team prepared the case for trial. The State's attorneys traveled to Mountain Village, visited with the victim's and the defendant's family, interviewed witnesses, secured out-of-state witnesses, and cleared the professional and personal calendars of the attorneys involved.

The State made significant efforts and incurred significant personal, professional, and financial costs to make sure the case was ready for trial as scheduled. The victim's and the defendants family, the witnesses, and the community of Mountain Village were made to suffer the emotional upset and personal scheduling disruption that comes with preparing for trial in a case such as this. All of this would have been avoided had notice been given to the State when it was first learned that counsel would be withdrawing.

The State also pointed to the additional prejudice of the significant delay that would result if counsel was permitted to withdraw and the case was continued. In an effort to avoid the delay and the prejudice that would result from a continuance, the State asked the court to order that Ms. Harber not be excused from the case. The State asked the court to reappoint

Ms. Harber pursuant to *Delisio v. Alaska Superior Court*.[1] The State asked the court to order that the Public Defender Agency contract with Ms. Harber and that the case proceed to trial as scheduled.

At the scheduled calendar call on July 16, 2019, less than one week away from the start of trial, substitute defense counsel, Assistant Public Defender Ms. Metzger, appeared. She to, like the State and the court, had only one day's notice of the withdrawal of counsel. The court attempted to contact Ms. Harber, without success. The court contacted Acting Public Defender, Ms. Goldstein, who agreed to appear telephonically on short notice for the agency.

Ms. Goldstein expressed willingness to contract with Ms. Harber at the Office of Public Advocacy rate to complete the trial. Ms. Goldstein had attempted to contact Ms. Harber to determine if she would consent to continuing on a contract but was unable to get a hold of her.

The court set on a hearing for July 18, 2019 for the purposes of considering the possibility of compelling Ms. Harber to continue in the case under contract with the Public Defender

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[1] 740 P.2d 437 (Alaska 1987) (holding that it was permissible to appoint a member of the private bar to represent an indigent defendant, even over the appointed counsel's objection, so long as the attorney was compensated at the rate of an average competent attorney).

Agency, because of the prejudice to the State, Mr. Walters, the victims, and the community.[2] In addition, the court gave notice that it would consider penalties under Civil Rule 95 in the form of costs and fees as a possible remedy for some of the prejudice suffered by the State.

The hearing convened on July 18, 2019. At the hearing, Ms. Harber appeared through counsel and took the position that she was unable to accept appointment because she had not yet set up her private professional office, including not yet having malpractice insurance. The Public Defender Agency, through Ms. Goldstein, took the position that, because of the circumstances surrounding her departure, the agency was not willing to contract with Ms. Harber to handle this case.

The Public Defendant Agency then went on to make institutional and budgetary arguments regarding the circumstances the agency finds itself in at this time, explaining that:

> The situation in the public defender's office is facing right now is quite dire. We are in a Catch-22 situation where, while we have the positions, we cannot fill them. We can't fill them because there is a retention and recruitment problem with the State and with many of the public defender offices around the country.
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> What is happening is there is a plethora of jobs-legal jobs in the lower 48. If you take a look at the Alaska Bar Association employment page, there are a

[2] Transcript, page 4

> ton of legal jobs in the state of Alaska. So I have case flows which are driven partly by the fact that there is an 80% appointment rate in this state for all felonies, and that is unsustainable. So as I have lawyers leave, I have had three lawyer short in the Bethel office, which is one of the reasons Ms. Harber took this case with her when she moved to Kenai. I am now three a lawyer short in the Kenai office.
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> I'm having a hard time recruiting. I don't have a travel authority to go out of state to recruit; I'm trying to fight that. We had recruitments fall through for, specifically, the Kenai office, and we had three lawyers leave; all of them attorneys IVs and Vs so those are most experienced lawyers.[3]
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> ...
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> So we are ramping up our recruitment efforts; we are reaching out more than we ever have before, but I had the deputy director for the Mexico public defender office in my office on Tuesday, and he said he's having the same exact recruitment problems. Our salaries up here used to be the draw, but there are plenty of public defender offices in the lower-48 who are offering those same exact salaries right now with lower cost of living and more stability in their government and their budget.
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> And so we are experience being behind the eight ball constantly, and we are doing our best.[4]

These institutional realities have created great pressure on individual assistant public defenders, Ms. Harber among them, driving up their caseloads to unsustainable levels.[5] Ms. Harber

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[3] Transcript, page 6.

[4] Transcript, page 7 - 8.

[5] It should be noted that these institutional and budgetary restraints on recruitment and retention are causing a reduction in the number of available assistant public defenders while, at the same time, felony case filings are increasing. Alaska Court System Filing and Disposition reports show that in fiscal year 2012, there were 6,269 felony case filings. For fiscal year 2019, the records show that there were 7,321 felony case filings. That is an increase of 1,052 case filings, an almost 17% increase. And the seriousness of the cases being filed should not be underestimated. According to a recent article in USA Today, in Anchorage, the violent crime rate of 1,163

was handling over 200 cases at the time she resigned. In this regard the agency states that:

> And Ms. Harber, in her capacity as the secondary supervisor in the Kenai office, had to take on an immense caseload, and under the weight of that, quite frankly, she hit the wall. And she did exactly what the Bar Association has told us to do. She stopped before she created incredible problems in a multitude of cases. And I have to give her credit for that.[6]

And so the agency is not willing to appoint Ms. Harber, because of what she had gone through. In the agency's judgment, she is not fit to take the appointment at this time. The court accepts the agency's judgment. Appointing Ms. Harber at this time and compelling her to proceed to trial as scheduled would not be in the interest of effective representation and justice.

This court asked the agency to address what appears to be a repeating pattern exemplified by this case. This court has pending now at least three homicides, including this case, and another serious felony where, for various reasons, late into the case, the assigned public defender withdraws and the case is

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incidents per 100,000 people is more than three times the national violent crime rate, and the metro area's property crime rate of 5,441 incidents per 100,000 is more than double the national property crime rate. The same article reports that Fairbanks has the sixth highest property crime rate among metro areas at 4,664 crimes per 100,000 people. It also has the second highest murder rate in the country, at 28.4 homicides per 100,000 people - more than five times the U.S. murder rate.
https://www.usatoday.com/story/life/parenting/2019/08/10/worst-cities-raise-children-family-education-crime/39929727/

[6] Transcript, page 6.

delayed significantly.[7] The agency responded to the court's concerns as follows:

> We - - I know that you are frustrated with the number of lawyers that have left, perhaps close to trial, because their senior, but the public defender agency can't keep lawyers from leaving. We do our best to retain them. We provide as much training as we possibly can under the strictures of a very difficult budget at this point in time, and if I had other options, I would. If I could fix this problem for you by assigning two senior attorneys to every homicide, I'd do it, I don't have the resources to do that. And that is just going to create more problems with caseload.[8]

The State does not take exception with any of the institutional arguments of the Public Defender Agency. Indeed the State sympathizes. The Bethel District Attorney's office suffers the same understaffing; this is why the State's attorney, Ms. Bachmann, is assigned to this case. The Bethel District Attorney's office was down three lawyers as this case was coming to trial and it was without a District Attorney.

The exception the State does take is that, because they were not given timely notice of the withdrawing attorney's

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[7] See, *State v. Williams*, 4BE-17-510CR,(nineteen months into the case, new counsel arrives due to attorney departure, continuing the case at least one year); *State v. Gilbert*, 4FA-17-1665CR, (fifteen months into the case, new counsel arrives due to attorney departure, continuing the case nine months); and State v. Robbins-Critchley, 4FA-17-1038CR, (sixteen months into the case, two weeks before trial, new counsel enters the case due to conflict, delaying the case for over a year). In addition the court has been recently assigned a serious unclassified felony case, *State v. Rivers*, 4HB-16-00101CR, where after the case was pending for nearly three years, new counsel arrives due to attorney departure, continuing the case for likely one year.

resignation, great unnecessary prejudice accrued. Had they been give notice, the State would not have gone to Mountain Village to visit with the witnesses there and would not have upset the lives of the people of that community. They would not have made the arrangements for travel and they would not have made the efforts to reorganize their personal and professional commitments so that they could fulfill their obligations in this case.[9] The State's main exception was put succinctly as follows:

> And with all due respect, the lack of courtesy from those who knew that this was likely happening in the Bethel D.A.s office, is a little jaw-dropping, and I know that these folks can do better, and I'm disappointed that they didn't.[10]

The court invited the State to submit a cost bill associated with the unnecessary trial preparation, but the State declined that remedy. The State is reluctant to monetize this issue, believing that imposing Civil Rule 95 costs would not enhance the health of the relationship that the Department of Law has with their sister agency.

At the hearing on the motion to continue, for the reasons set forth in this Decision and Order, the court granted the continuance over the State's objection and found that there was

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[8] Transcript, page 7.
[9] For example, one of the State's lawyers cut short a visit with close relatives in order to assist in preparation for trial. Another took an unscheduled, brief mental health break so that he would be refreshed and could dedicate himself to trial.
[10] Transcript, page 10.

attorney misconduct by failing to advise the State of the assigned attorneys' departure. The court declined to impose Civil Rule 95 penalties. The court admonished Ms. Harber and the Public Defender Agency for both the prejudicial withdrawal and failure to provide notice.

Following that ruling and admonition, the Public Defender Agency filed a Motion to Disqualify this court citing bias against the agency and the defendant. The motion contends that the findings in support of the ruling and the manner of ruling reflect an actual or apparent bias against the agency, all its attorneys, and the defendant.

III. DISCUSSION

A. Motion to Continue

Despite the prejudice to all involved including the State, Mr. Walters, the victim, and the community, the motion to continue the trial must be granted. The withdrawing attorney is no longer with the Public Defender Agency. The agency is not willing to contract with the attorney for purposes of continuing the trial on time. The agency is in a better position than the court to make this judgment and so the court defers to the agency's judgment in this regard. The withdrawing attorney's current circumstances do not permit her to try this case as scheduled.

Civil Rule 95 costs are appropriate for the failure to give the State timely notice of the withdrawing attorney's departure. The State declines that remedy in the interest of harmonious relations with their sister agency. Accordingly, no costs will be assessed.

This court rejects the contention that it cannot compel the withdrawing attorney to proceed to trial as scheduled.[11] If the Public Defender Agency is not willing to contract with the withdrawing attorney, then the court can pay for continued representation under Administrative Rule 12. But the court accepts the contention that Ms. Harber is not fit to handle this case at this time. The court accepts the proposition of her mental exhaustion and finds her ethically unfit, lacking the professional responsibility fortitude necessary in this case. The defendant deserves more. The criminal justice system deserves more. It would be a futile exercise to compel this case to trial with the Public Defender Agency and Ms. Harber resolved that proceeding to trial would be an exercise in ineffective assistance of counsel.[12]

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[11] See, Rules of Professional Conduct, Rule 1.16 (c) "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

[12] The court characterized this "ineffective assistance" argument as the last refuge of defense attorneys who seek continuances because, once invoked, there is little a court can do but accept the

Ms. Harber is admonished for her professionally irresponsibility. Notice of the pending withdrawal should have been made. The unsustainable caseload that resulted in this withdrawal should have been managed earlier. Attorneys have a duty not to take on unsustainable caseloads.[13] The withdrawal itself should have been managed more professionally. Withdrawing attorneys have a duty to protect their client's interests while withdrawing.[14] The defendant's interests in a speedy trial and in avoiding lengthy pretrial incarceration are not protected with this withdrawal. Greater fortitude and greater professional responsibility is required by the rules.

Whether Ms. Harber is generally fit to practice law will not be resolved in this motion. It is sufficient that the agency's position is that Ms. Harber is not fit to continue in

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professional representation in this regard and grant a continuance, no matter whether there is good cause for not being prepared and no matter how systematic the requests for lengthy delays become.

[13] See, Rules of Professional Conduct, Rule 1.3, "A lawyer shall act with reasonable diligence and promptness in representing a client." The commentary to the rule states: "A lawyer's work-load must be controlled so that each matter can be handled competently." "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

[14] See, Rules of Professional Conduct, Rule 1.16(d) "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel…"

this case and that they would not assign this case to her because of her mental exhaustion.

The Public Defender Agency is admonished for not advising opposing counsel of the withdrawal in a timely manner. And the court notes that to the extent the agency imposes unsustainable caseloads on their attorneys, the agency violate the prohibition against unsustainable caseloads set forth in Rule 1.3 of the Rules Professional Conduct.

The court vacates the scheduled trial. Ms. Harber is excused. The court has considered whether a report to Bar Counsel is required under the applicable judicial cannon[15] and finds that no further report is required. The appropriate authority for referral of Ms. Harber's conduct is the Public Defender Agency. The agency is fully advised of the circumstances of this case and the court defers to the agency's judgement.

B. Institutional and Budgetary Limitations

As part of the motion and opposition, both the Department of Law and the Public Defender Agency's cite institutional and

[15] See, Cannon 3(D)(2), "A judge having information establishing a likelihood that a lawyer has violated the Rules of Professional Conduct shall take appropriate action. A judge who obtains information establishing a likelihood that a lawyer has committed a violation of the Rules of Professional Conduct by an act of dishonesty, obstruction of justice, or breach of fiduciary duty shall inform the appropriate disciplinary authority, unless the judge reasonably believes that the misconduct has been or will otherwise be reported."

budgetary limitations that are the product of political decisions that are affecting their ability to meet their professional obligations to the people of Alaska. Both cite vacancies in their offices due to retention and recruitment difficulties. In addition, the Public Defender Agency points to travel restrictions imposed on their agency.

These limitations reflect political and administrative choices of the legislative and executive branches that are beyond this court's jurisdiction. But the record in this case should reflect that the current political and budgetary choices have consequences and those consequences are manifest in this case.

These consequences of these policy choices include the failure to uphold the victim's and the defendant's rights to a timely disposition.[16] The people of Alaska, and the people of the Yukon-Kuskokwim region, should know that the delays in this case are the consequences of these choices.

The parties' positions in this case establish that the State of Alaska's criminal justice system is operating on the fringes, barely able to protect against the deprivation of

[16] At some point time, if those choices go beyond legitimate political choices and become intentional impairment of fundamental rights of victims and defendants, the court can act as necessary to protect those rights. The circumstances in this case do not rise to that level.

fundamental rights, barely able to respond in a professionally responsible manner to Alaska rising violent crime rates. The record in this case should reflect that, as a result of the policy and budget choices made by the legislative and executive branches, the people of Alaska must tolerate years long delays in the prosecution of the type of crimes charged in this case - crimes against women, crimes fueled by substance abuse, crimes against law enforcement officers, crimes against rural Alaskans, crimes perpetuated by repeat offenders. The people of Alaska should know that the Department of Administration, and to some extent the Department of Law, is unable to manage these vital interests in a professionally responsible way because of the political and budgetary choices that are being made.

The court accepts that institutional and budgetary restraints are at the core of the Public Defender Agency's limitations. The court takes no position on those political choices except to point out how they manifest themselves in this case and in a systematic way in many other cases across the state. The court's findings in this regard have no bearing on the conduct of the Public Defender Agency or the defendant.

C. Internal Agency Management

The Public Defender Agency is correct that these political and budgetary limits are beyond their control. The court accepts

that the agency is doing the best it can to manage their responsibilities in the face of rising crime rates, rising case assignments, and retention and recruitment problems. And the court finds that the agencies' choices are not unreasonable.

But the current approach is just not working. Assigning 200 cases to an attorney, including serious felonies such as this, and pushing the attorney to the point of exhaustion, is not a sustainable strategy and is inconsistent with the Rules of Professional Responsibility. And as a practical matter, the plain result is yet another vacancy. The time demands of cases such as these are too great for such a caseload.

As discussed above, this is not an isolated instance of late substitutions causing serous delays. Attorney substitutions late in serious cases are a systematic problem. These substitutions result in long delays. When a new attorney enters a case, it is expected that the new attorney will to need to familiarize themselves with the case and formulate their own view on the case. This often involves reviewing large amounts of documentary and digital evidence, including significant amounts of audio and video evidence. This takes a great deal of time. The new attorney will need to devise their own approach, will need to consider their own motions, and will need to do their own investigation. In short, start over. As a result, a case

such as this can be delayed another year. And because of retention problems, by that time the new attorney is at risk of departing the case. This is contrary to the duty of attorneys and the agency to expedite litigation.[17]

The court accepts that attorney departures are now part of the natural vicissitudes of the agency's operation. And the court accepts that the agency cannot stop attorneys from leaving. But if attorney departures are now a standard hazard, then new management practices must evolve to address this new reality.

An alternative approach might be to insulate attorneys with serious felonies from dealing with lesser cases. Often, as the court is trying to address serious cases with significant delays, it happens that the same attorney is tied up in District Court tending to misdemeanors. Not that those cases don't have merits, but there is a management choice to be made. Very serious cases such as this deserve priority and the attorney's handling these cases deserve protection from overbearing caseloads. If cases are to be walked away from, better it be lesser cases. If a defendant is to be abandoned, better choices can be made than the defendant in this case.

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[17] See, Rules of Professional Conduct, Rule 3.2, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

This pattern must stop. The Public Defender Agency must take another course of action. It could hire more conscientious attorneys; assign the most serious cases to the most conscientious attorneys; insulate those attorneys from petty misdemeanors or cases of lesser importance than these serious cases; and they can commit to getting serious felonies to trial in the first year of their life or within six months of all the evidence being in, to guard against the risk of losing the assigned attorney to retention limitations. These are examples of a different choice.

This court is in no position to advise the Public Defender Agency what choices to make and does not intend by these findings to interfere with the administration of the agency. These alternative possibilities are given as examples of action that might be taken. These alternatives are identified for purposes of the court's rejecting the contention that there is nothing to be done. The agency should not just surrender with an ineffectual rising of hands. There are other approaches.

The interests present in this case could not be higher. The indictment alleges fatal domestic violence, an offense against not only the victim, but also the peace and dignity of Mountain Village and the entire Yukon-Kuskokwin region. Violence against domestic partners, violence against native women, and violence

against law enforcement officers are all interests that are present in this case. Attorneys assigned to cases like this are called upon to take on significant professional responsibility. They are required to marshal significant professional courage and must devote significant time to these cases. Management choices could and should be made to give attorneys assigned to these cases protection from unsustainable caseloads and the distractions of less serious cases. But those choices belong to the agency.

D. Further Proceedings

The case must now be reset for trial. New counsel will be given the necessary time to review the case and formulate a position on further proceedings. The court notes that the motion deadline has passed in this case. The court will not accept any motions at this time, except with a motion to accept late filing.

The court advises new counsel that this case should move to the top of counsel's professional responsibilities. If there are other cases of this seriousness that are older than this case, then this case would yield to the higher or equal priorities of those that are older. The court leaves it to new counsel to formulate a position on further proceeding in this context.

But there is an immediate need in this case that must be addressed without delay. The State contends that there is an elder in the village, related to the defendant, who is old and frail and conflicted and who needs to be deposed in order to perpetuate her testimony. This is an example of the prejudice from the continuance that must be mitigated. The parties are instructed to confer to determine if an agreement can be reached regarding the deposition. If no agreement can be reached, then the court will resolve any differences. New defense counsel is given till the next hearing in this case to attempt to formulate a position with regard to the State's motion to take this deposition.

E. Motion to Disqualify

AS 22.20.020(a)(9) provides that a judicial officer may not act in a matter in which "the judicial officer feels that, for any reason, a fair and impartial decision cannot be given." Canon 3E(1) provides that:

> Unless all grounds for disqualification are waived as permitted by Section 3F, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer ….

Mere evidence that a judge has exercised their judicial discretion in a particular way is not sufficient to require

disqualification.[18] Even incorrect rulings against a party do not show bias in and of themselves.[19] Disqualification was never intended to enable a discontented litigant to oust a judge because of adverse rulings made."[20]

In *Hanson v. Hanson*, the Alaska Supreme Court noted that "[t]o succeed on a motion to disqualify a judge for bias, the movant must show that the judge's actions were the result of personal bias developed from a nonjudicial source."[21] The court went on to explain that "as a result, a judge is not disqualified if the judge's knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings …."[22]

There is an exception to the extrajudicial source doctrine for a narrow category of judicial remarks. As the court explained in *Hanson* "[t]he primary exception to the 'extrajudicial source' doctrine exists when an opinion, even though it springs from the facts adduced or the events occurring at trial, [ ] is so extreme as to display clear inability to

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[18] *State v. City of Anchorage*, 513 P.2d 1104, 1112 (Alaska 1973), overruled on other grounds by *State v. Alex*, 646 P.2d 203, 208 n. 4 (Alaska 1982).
[19] *Greenway v. Heathcott*, 294 P.3d 1056, 1063 (Alaska 2013).
[20] *Wasserman v. Bartholomew*, 38 P.3d 1162, 1171 (Alaska 2002) (footnote and internal quotation marks omitted).
[21] *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001) (quotation and citation omitted).
[22] *Id.*

render fair judgment."[23] In *Phillips v. State*, the Court of Appeals assumed that "Alaska law mandates disqualification of a judge when the circumstances give rise to a reasonable appearance of bias, even when there is no proof that the judge is actually biased."[24] *Phillips* was decided in 2012. Since then, the Alaska Supreme Court has issued a series of decisions that make clear that the appearance of bias forms an independent basis for mandating recusal.[25]

The test for assessing whether there is an appearance of bias is as follows:

> The judge who is asked to recuse themselves—and later, the reviewing court—must gauge whether someone who was apprised of the situation would reasonably suspect that the judge's ability or willingness to decide the case fairly would be compromised by the judge's feeling about, or toward, the other person.[26]

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[23] *Id.* Also see, *Downs v. Downs*, 440 P.3d 294, 299-300 (Alaska 2019), ("We have repeatedly held that a party must demonstrate that the court formed an unfavorable opinion of the party from extrajudicial information and that bias cannot "be inferred merely from adverse rulings." But judicial bias may also arise during the course of judicial proceedings if "a judicial officer hears, learns, or does something intrajudicially so prejudicial that further participation would be unfair."

[24] *Phillips v. State*, 271 P.3d 457, 466-67 (Alaska App. 2012).

[25] See, *Snider v. Snider*, 357 P.3d 1180, 1187 (Alaska 2015); *Heber v. Heber*, 330 P.3d 926, 933 (Alaska 2014); *Greenway v. Heathcott*, 294 P.3d 1056, 1062-63 n.7 (Alaska 2013); *Griswold v. Homer City Council*, 310 P.3d 938, 941 n.6, 943 (2013). Also see, *Downs v. Downs*, 440 P.3d 294, 299-300 (Alaska 2019).

[26] *Phillips v. State*, 271 P.3d 457, 469 (Alaska App. 2012).

This is an objective standard, based on a fair-minded person.[27] The Alaska Court of Appeals recently used somewhat different language to articulate essentially the same standard:

> As to what sort of appearance of bias will require a judge's disqualification, we note that the Comment to Alaska Judicial Canon 2A declares that the test is 'whether the [judge's] conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.[28]

Alaska Courts have held that where only the appearance of partiality is alleged, a "greater showing" is required of the moving party.[29] As for what sort of appearance of bias will require a judge's disqualification, the Alaska Supreme Court held:

> [T]he test is "whether the [judge's] conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."
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> Although Alaska Judicial Canon 3(B)(4) requires judges to be "patient, dignified, and courteous to litigants", judges are generally not required to remove themselves from a case simply because they have made remarks that are critical of, or even hostile to, an attorney or a litigant.[30]

The Alaska Supreme Court in *Hanson* quoted with approval the United States Supreme Court's opinion in *Liteky v. United States*:

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[27] *Wasserman v. Bartholomew*, 923 P.2d 806, 816 (Alaska 1996).
[28] *Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014).
[29] *Snider v. Snider*, 357 P.3d 1180, 1187 (Alaska 2015); *Greenway v. Heathcott*, 294 P.3d 1056, 1063 (Alaska 2013).

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.... *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance and even anger that are within the bounds of what imperfect men and women ... sometimes display.[31]

The Alaska Supreme Court has observed that a loss of judicial temperament such as a rising of the judge's voice, may demonstrate the judge's frustration, but it does not necessarily establish that the judge had a personal bias against a party or counsel arising from a non-judicial source. At times, a judge may give the appearance of being hostile toward a party and repeatedly express their displeasure with a party, but this does not establish that the judge acted from any personal bias, or that the judge's statements and actions give rise to an appearance of bias that warrants disqualification from the case.[32] Expressions of impatience, dissatisfaction, annoyance and even anger, which are within the bounds of what imperfect men

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[30] *Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014).
[31] *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001) (quoting *Liteky v. United States*, 510 U.S. 540, 555-56, 114 S.Ct. 1147 (1994)).
[32] *Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014).

and women sometimes display, do not establish bias or partiality.[33]

In the present case, this court's Decision and Order granting the continuance, declining to impose sanctions, and admonishing the withdrawing counsel and the Public Defender Agency is based on the facts of the case, developed on the record, in open court, with the defendant present. Each of the court's set of findings was based on factual propositions and issues raised by the parties.

Central to the motion to continue the trial and the opposition thereto was the undisputed facts surrounding the departure of the withdrawing attorney. There was no dispute of fact regarding the withdrawing attorney's and the agency's failure to notify opposing counsel of the attorney's departure. The prejudice to the State, the victim, the witnesses, and the community of Mountain Village was not contested. That it was wrong to not notify opposing counsel of the departure was also not contested.

The court's admonishment of the attorney and the agency was based on these undisputed facts, established on the record in open court. The admonishment naturally follows from the uncontested facts. It does not reflect any bias or antagonism

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[33] *Luker v. Sykes*, 357 P.3d 1191, 1199 (Alaska 2015).

toward the attorney or agency. It is an inescapable conclusion based on undisputed facts. Even the agency agrees that the failure to notify should not have happened. Their position is only that it is unavoidable because of institutional and budgetary realities that effect attorney retention.

In defense of the motion, the Public Defender Agency, and to some extent the Department of Law, raised specific institutional and budgetary arguments in defense of their position. Each of the court's findings with regard to the institutional and budgetary restraints on the agency is made in response to arguments advanced by the agency. They are not extrajudicial.

Indeed the court accepts the representation made by the Public Defender Agency and the Department of Law with regard to these institutional and budgetary limits. The court's central holding with regard to the political and administrative arguments of the agency was that these questions are beyond the jurisdiction of the court to remedy. At the same time, the agency is right to raise them. The court's findings in this regard support the Public Defender Agency's position - the current institutional and budgetary policies of the State of Alaska impair the Public Defender Agency's ability to do their jobs in a responsible way. These political and administrative

choices are manifest in this case in the form of unreasonable delays and disruptions. The court's findings in this regard are supportive of the agency.

The court's findings with regard to the issues present in this case and the types of crimes charged in this case are derived from the indictment and the record of proceedings. This case raises many important criminal justice issues intrinsic to fatal crimes of domestic violence in rural Alaska; it raises important constitutional issues concerning the victim's rights to timely disposition; and it raises important constitutional issues concerning the defendant's right to a speedy trial and to not being held in-custody for years, pretrial.

These are not prejudgments of the defendant. They are the facts and issues of the crimes charged. The point of these findings is that, if these important public interests matter to the political and budgetary decision makers and the public, they should know that the current policies do not protect or advance these interests. These findings go to the political and budgetary arguments of the parties. It is important that the court respond to those arguments. The court identifies how those policies are manifest in this case. These policies manifest themselves to the detriment of the defendant, the victims, and the public.

The judgment of the court is that the policy decisions of the legislative and executive branch have left the Public Defender Agency, and to a large extent the Department of Law, unable to meet their obligations responsibly. This is the position the Public Defender Agency took on the motion. The court agrees with that position. These findings have no bearing on the agency or on the defendant.

These findings do not amount to a prejudgment of the defendant in this case and are not an interference with the defendant's presumption of innocence. The court makes no comment on the guilt or innocence of the defendant. As made plain by the court from the beginning to the end of the hearing on the motion, among the interest being sacrificed in this case is the defendants right to a timely trial. He is being held in-custody and is facing very serious charges. He deserves a trial without further delay.

With regard to the internal agency management issues raised by the Public Defender Agency, the court is clear that it is not telling the agency how to manage its affairs or what choices to make. The court merely rejects the proposition that there is nothing to be done. The court sets forth other conceivable alternatives and trade-offs as possible alternatives. The court

does not intend to suggest that the agency should do these things, only that there are other choices.

It is the court's judgment that it is better for other defendants in other cases to be shorted on the precious resources. These very serious cases, with defendants who have been waiting in-custody for over a year for their trial should be given a priority in the court's judgment. This judgment is based on the arguments of counsel and the record in this case. It is not a wholesale criticism of the Public Defender Agency and all its attorneys. It is not evidence of a deep-seated bias against the agency.

This court's knowledge of the case and the decision and order it produced were properly and necessarily acquired in the course of the proceedings. They were responsive to the arguments on a contested motion. In fact, the court granted the public defender agency's motion; the court accepted the public defender agency's position with regard to withdrawing counsel; and the court did not impose sanctions which clearly would be justified. These judgment's do not suggest a bias. Indeed the court agreed with the Public Defender Agency in virtually all respects.

Judges take no pleasure in admonishing attorneys. But motions such as the one before the court sometimes squarely call for findings critical of attorneys. Judges are responsible for

keeping cases on track. Judges routinely deal with repeated struggles to have discovery produced in a timely manner or with repeated struggles to avoid the delays based on claims of lack of preparedness. These case management struggles are part of the judicial officer's responsibility. A judge cannot simply acquiesce to delays that extend cases for years while defendant's wait in custody and the victims and witnesses are repeatedly ready for trial then delayed. Judges are required to make findings with regard to the causes of the delay.

Judges carry out of this responsibility frequently, sometimes admonishing parties for late discovery or motions and sometimes admonishing both prosecution and defense attorneys for repeated delays. This does not mean such judges have a deep-seated bias against the parties and attorneys admonished. It is simply the nature of the judicial role.

The last of the arguments in the Motion to Disqualify is that the manner of the court's ruling suggests a bias. But nothing in the manner of the court's ruling suggest any such thing. The court's findings were delivered at the hearing on the motion in a deliberate, direct, and measured tone. There was no raised voice and no passion. There is nothing to suggest that the courts findings are so extreme as to display clear inability to render fair judgment.

The issues present in this case are complex, personal, institutional, and political. The court is careful to try not to overstep any of these boundaries. The court does not criticize the attorney or the agency lightly. The court's findings are not a total indictment of the withdrawing attorney, the agency, or all public defenders. Indeed, the implicit facts of this case are that Ms. Harber has been handling hundreds of cases for years in a professionally responsible manner and the Public Defender Agency is handling thousands of cases each year in a professionally responsible manner. There is no reason for any court to hold a deep seeded resentment against the Public Defender Agency or any of its attorneys. On the whole they are to be commended for all they do in the face of serious institutional limits. The court's findings are limited to the specific professional failures and the specific prejudice caused in this case as set forth in this decision.

It is argued that the length of the court's ruling suggests bias. But the court is obliged to explain its decision and to make the necessary findings and orders sufficient to grant a continuance over the objection. The court is obliged to explain why it declines to compel withdrawing counsel to continue in the case and why it declines to impose sanctions. The court is required to explain to the defendant, the victims, the

witnesses, and the affected community why this case is being delayed. The court is obliged to address the arguments raised, both in the findings and in the analysis.[34]

The courts findings made during the course of the hearing on the motion are tied to the motion. To the extent they are critical or disapproving of the withdrawing attorney or the agency, is because that is how the motion is framed. Although critical and disapproving on the facts of this case, the findings are not hostile to counsel, the agency, or the defendant. These findings do not suggest such a high degree of antagonism as to make fair judgment in this case impossible. They are not so extreme as to display a clear inability to render fair judgment.

The judgment of the court on the motion is not an expression of impatience, dissatisfaction, annoyance, or anger with the withdrawing attorney or the Public Defender Agency. The court has worked for more than a decade with the attorneys of the agency, sometimes denying request for continuances and

[34] The motion argues that the court's not permitting further argument after the court issued its ruling is evidence if bias and intemperance. It is true that after the court's ruling, the Acting Public Defender wanted to argue the motion further. It is this court's custom, in all cases and with all parties and counsel, to not permit further argument after a ruling. The proper procedural device is a motion for reconsideration. The court invited such a motion, but one was not filed. This procedural position is based on this court's understanding of the Rules of Civil Procedure and applies to all

sometimes compelling cases to go to trial. This is just another instance of a common motion. The findings in this case are just the matters of fact of this case.

The court would be happy to acquiesce to the request for reassignment so that the specter of the Motion to Disqualify can be removed. But there is no just cause. A judge has a duty to sit in cases as assigned. Judges cannot grant motions to disqualify lightly. The Alaska Supreme Court has stated:

> In Alaska, a judge has an obligation not to order disqualification "when there is no occasion to do so." Trial judges are often called upon to compartmentalize their decisions—to review evidence that is later declared to be inadmissable or to rule on similar legal issues at different stages of a contested case. Generally, these decisions do not create an appearance of impropriety unless the judge hears something or does something so prejudicial that further participation would be unfair to the parties.[35]

In the absence of a valid reason for disqualification, this court has a duty to remain on this case.[36] There being no basis for recusal based on actual or apparent bias, this court must deny the Motion to Disqualify.

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parties and all counsel in all cases. It is not indicative of any bias against the parties or counsel in this case.

[35] *Grace L. v. State, Dept. of Health & Social Services, Office of Children's Services*, 329 P.3d 980, 989 (Alaska 2014).

[36] See, *Phillips v. State*, 271 P.3d 457, 468-69 (Alaska App. 2012). (The duty to sit is not "a countervailing consideration that must be weighed against a valid ground for disqualification." "Judges have a duty to carry out the tasks assigned to them—in particular, the duty to preside over and decide the cases assigned to them—unless there is good cause for judge's recusal. But if there is good cause, then a

IV. Conclusion

Because the Public Defender Agency is not prepared to contract with the withdrawing attorney to continue to handle this case and because the withdrawing attorney is not fit to continue at this time, the Motion to Continue must be granted. The State has suffered prejudice because of the failure to notify of the withdrawal in a timely manner, but because the State declines to ask for Civil Rule 95 penalties, no costs or fees are imposed. Because the withdrawing attorney and the Public Defender Agency did not provide notice to opposing counsel of the pending withdrawal when doing so would have avoided significant cost and prejudice, withdrawing attorney and the Public Defender Agency are admonished. Because the admonishment necessarily follows on the facts of the motion in this case and was not delivered in a manner that would suggest an actual or apparent bias, the motion to disqualify must be denied.

V. Orders

Accordingly,

IT IS HEREBY ORDERED that the Motion to Continue is granted.

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judge has a duty to acknowledge the disqualification and remove themself from the case.")

IT IS FURTHER ORDERED that no Civil Rule 95 sanctions will be imposed. Ms. Harber and the Public Defender Agency are admonished for failing to notify opposing counsel of the pending withdrawal in a timely manner.

IT IS FURTHER ORDERED that the Motion to Disqualify is denied.

DATED this 30th day of August, 2019 at Fairbanks, Alaska.

Michael A. MacDonald
Superior Court Judge

I certify that on 8/30/19 copies of this form were sent to:
CLERK: DA (Bethel)
PD (Bethel)
Administrative Director's Office