

GETTING REAL WITH FASD IN THE COURTROOM AND BEYOND

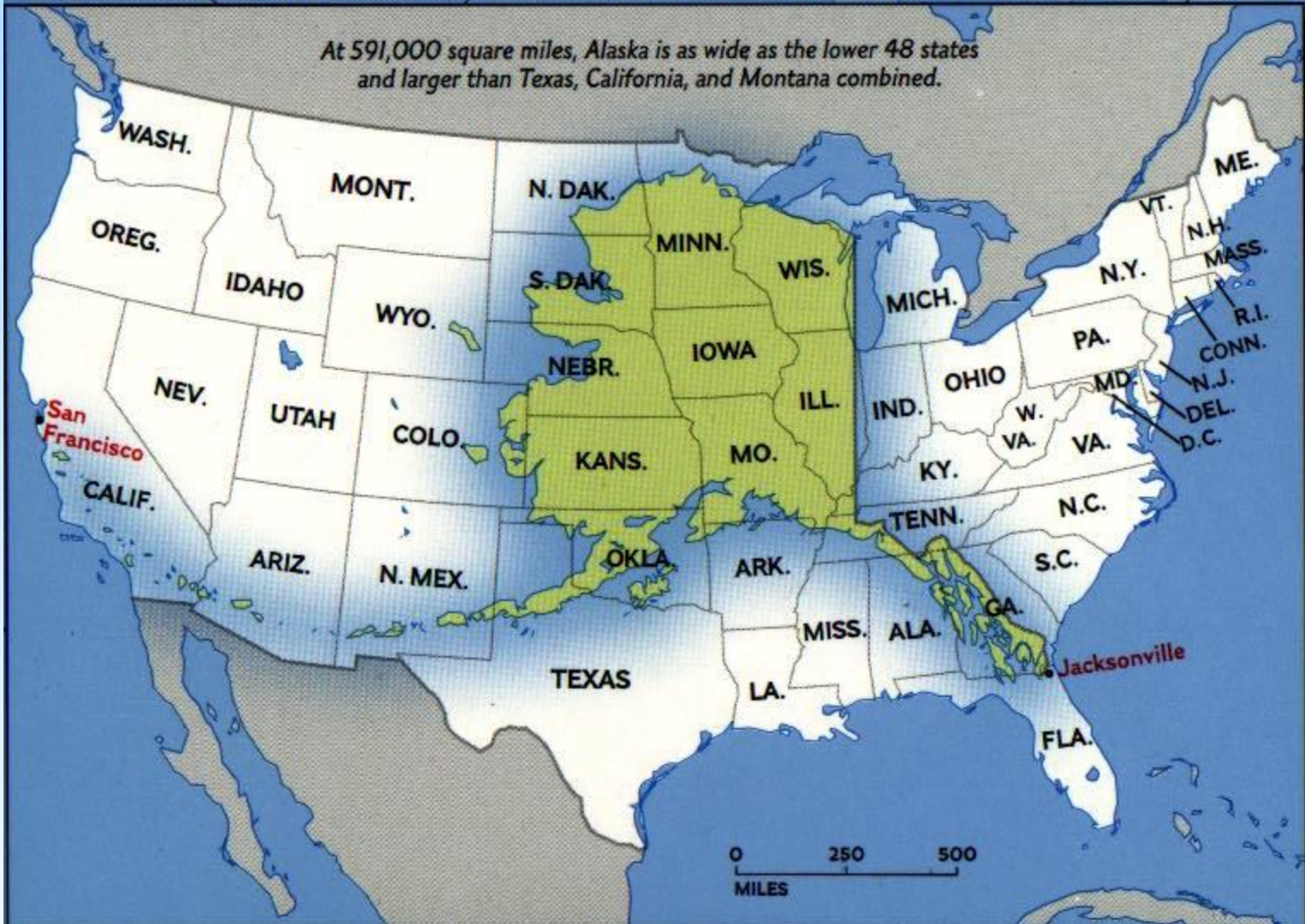
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Second Hawaii Conference on FASD
FASD: Improving Outcomes Across Systems
Of Care

September 18, 2019
Hale Koa Hotel Waikiki
Honolulu, Hawaii

RELATIVE SIZE OF ALASKA AND THE CONTIGUOUS U. S.

At 591,000 square miles, Alaska is as wide as the lower 48 states and larger than Texas, California, and Montana combined.

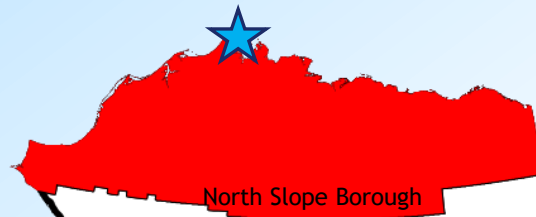


Utqiagvik (Barrow)

- pop. 4,335 (2016 est.)
- 60.5% Inupiat

Part of North Slope Borough

- pop. 9,782 (2017 est.)
- 94,796 sq. miles (1/2 of California)



North Slope Borough



Bristol Bay





TRADITIONAL VALUES OF THE INUPIAT PEOPLE OF ALASKA'S NORTH SLOPE

- SHARING
- COMPASSION
- FAMILY & KINSHIP
- AVOIDANCE OF CONFLICT
- HUNTING TRADITIONS
- HUMOR
- LOVE AND RESPECT FOR ELDERLY AND ONE ANOTHER
- RESPECT FOR NATURE
- SPIRITUALITY
- COOPERATION
- KNOWLEDGE OF LANGUAGE
- HUMILITY

My situation

- * Active Superior Court Judge for 32 years: Felonies/Misdemeanors/Child Welfare/Juvenile Delinquency/Civil Litigation
- * Court is in a remote regional rural center-not on the road system
- * Nearest FASD evaluation team is 500 miles south, requiring RT flight
- * There are some people in town knowledgeable about FASD

My situation (continued)

- * People in the justice system have heard about FASD, but most are not changing “business as usual”
- * No FASD working group at this time
- * I have provided basic FASD training to many professionals in our system of care.

What I assumed at first

- * A person understands when they appear to understand and say they do.
- * A person would not make a statement against interest unless forced to do so or it was true.
- * A person makes informed and voluntary choices to commit crimes and to exercise rights.

*Someone pays attention and will learn when I say if you do..... THEN this will happen.

*If someone acts inappropriately in court, probably not taking process seriously

Some realities of working with FASD in Court

- * Person Appears Normal so participants cannot tell who is affected-90% have NO facial differences: **an Invisible Disability**
- * FASD is a **Medical Condition**-Anyone exposed to alcohol before being born could have it
- * FASD is a “**Spectrum Disorder**” -people are affected differently
- * Inappropriate Behavior not unusual

Some realities of working with FASD in Court (continued)

- * Can't Understand Consequences
- * May Give False Confession or Waiver-
desire to please/end interview ASAP
- * Needs more time to ensure
understanding
- * Challenges with making court
hearings/appointments
- * Needs **On-Going Support**; stopping
support because someone doing well
is a **bad idea**



* ”Special populations” have higher incidence of FASD

- * Yukon Correctional, Canada, study (2013): 25% of jail inmates met FASD criteria with another 25% possible.
- * Banksia Hill Youth Custodial Detention, Western Australia (2018): 36% confirmed FASD; 89% had at least one “severe impairment” of brain function.
- * Worldwide studies (2019 meta-analysis) show 7.7/1000 FASD in general population, but ”special populations” including justice system had rates 10 to 40 times higher.
- * **SO WE ARE WORKING WITH A SUBSTANTIAL NUMBER OF AFFECTED PERSONS!!**

**IF these issues not
recognized, our Court
Hearings can be unfair
and even meaningless**

*Ethics Issues For Me:

Knowing what I know about FASD, how do I preserve fair hearings that are understandable to everyone?

How do I deal with other parts of the justice system outside my courtroom?

How do I deal with FASD when little or no support exists?

**ANSWER FOR ME: START WITH
THE CONTROL I HAVE IN MY
OWN COURTROOM**

Some responses I tried

- * Slow Down
- * Use Concrete Language
- * Re-Write Common Forms so are in plain English
- * Don't Depend on Attorneys To Explain
- * Take Extra Breaks
- * Look at the Person

Some responses I've tried (continued)

- * Mention potential FASD condition to person and in documents (along with accommodation recommendations)
- * Draft understandable bail order and criminal sentences with supervision built in when possible
- * Schedule review hearings

For example. . .

Style of Earlier Standard Statewide Bail Form

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA AT _____
 STATE OF ALASKA _____ CASE NO. _____
vs.
Defendant: _____
DOB: _____ DL/ID: _____ ST _____ CDL ATN: _____ APSIN: _____

ORDER AND CONDITIONS OF RELEASE

- IT IS ORDERED that the above-named defendant be released:
- OWN RECOGNIZANCE (O.R.). Defendant does not have to post bail.
 - Defendant to execute the following bonds:
 - APPEARANCE BOND in the amount of \$ _____
 - Unsecured 100% Cash Only
 - 10% Cash 100% Cash or Surety
 - PERFORMANCE BOND (non-corporate) in the amount of \$ _____ (100% cash)
 - THIRD PARTY CUSTODIAN _____
 - 24-hour sight and / or sound Custodian may return defendant to jail for any reason
 - _____
 - Defendant to obey the following conditions:
 - Appear in court when ordered.
 - Obey all court orders and all local, state, and federal laws and ordinances.
 - If represented by an attorney, maintain contact with your attorney.
 - Notify your attorney within 24 hours of any temporary or permanent change in your residence or mailing address.
 - Notify court in writing of any change in mailing address.
 - Do not depart from _____ without written court permission.
 - Do not consume alcohol or be where alcohol is sold or consumed.
 - No contact directly or indirectly with _____
 - _____

NEXT COURT HEARING: _____
(Date) (Time) (City)

Date Judge/Magistrate

ACCEPTANCE OF DUTIES BY CUSTODIAN. I understand my duties as a custodian and agree to perform them. I understand that I must make every effort to assure that defendant appears at all hearings and complies with all conditions of release. If defendant violates any condition of release, I must immediately report it to local law enforcement and the prosecuting attorney. I understand that I may be punished for contempt of court and charged with a crime if I fail to perform my duties.

Custodian's Signature Date of Birth Work Phone
Residence Address City State ZIP Home Phone

AGREEMENT BY DEFENDANT. I reviewed the above order. I promise to appear at all court hearings and to comply with all other conditions set.

Defendant's Signature
Residence Address City State ZIP Home Phone Work Phone

I certify that on _____ a copy of this order was sent/given to (list names):

Clerk: _____

BAIL PROMISES: FOLLOW THESE RULES AND BE SUCCESSFUL ON BAIL!

I promise the Court that I will follow the rules that have been checked:

- Stay sober.** I will stay away from alcohol. [0.00 BrAC] My initials: [_____] [NO alcohol]
- Be drug-free.** I will be “clean” of illegal drugs and stay away from them. My initials: [_____] [NO illegal drugs]
- Stay away from alcohol and illegal drugs.** I will only be in places that have no alcohol and no illegal drugs. My initials: [_____] [NO alcohol and no illegal drugs]
- Take “PBT.”** I will take a portable breath test (“PBT”) when an officer asks me to. I know the officer has to have a reasonable suspicion that I have used alcohol. My initials: [_____] [NO PBT]
- Let others drive.** While in town, I will ONLY be a passenger in a car, truck, snow machine or four-wheeler. [NO driving in town] My initials: [_____] [NO driving in town]
- No contact.** I will stay away from and have NO CONTACT with: _____
- _____
- [Including NO calls, texting, sending letters or email, Facebook posts or other messages].
- Stay 100 feet away.** I will always be at least 100 feet away from this place: _____ My initials: [_____] _____
- I can go to this place ONCE with an officer to get my personal things. My initials: [_____] _____
- Be with third party.** I will be with _____, my “third party custodian” all the time _____ My initials: [_____] _____
- Allow search.** I will let the police search my living space, my clothes, or my car or truck for alcohol illegal drugs weapons. They don’t need a warrant. My initials: [_____] _____
- Be home.** I will be inside or right beside a house from _____ p.m. to _____ a.m. OR at times set for me by my probation officer. My initials: [_____] _____
- Stay in touch with attorney.** I will stay in touch with my attorney, if I have one. My initials: [_____] _____
- Tell about new address.** If I change where I live or my mail address, I will tell my attorney or the court within a day. My initials: [_____] _____
- Get OK before leaving.** I will get a written OK from the Court before I leave Alaska and Barrow _____ My initials: [_____] _____
- I will stay out of trouble and follow all the laws.** My initials: [_____] _____

Plain English/ Positive Wording in My Earlier 4-Page Bail Form (Law has changed)

Some things I wish I'd done better

- * Do a better job of explaining at the start what the hearing is about
- * Explaining the next steps at the end of hearing
- * Schedule future court dates at the same time and the same day of the week (when possible)

There are pressures against any such changes

- * Court staff in a hurry to return to desk
- * Institutional interest in “moving cases”
- * Participants don’t have enough time blocked for hearing-forgetting mine take longer
- * Scheduled time for hearings not enough to engage with litigants in an understandable way

There are pressures against any such changes (continued)

- * Attorneys don't know how or have no time for effective communication with clients with cognitive impairments like FASD. But they think they do....
- * Lack of support from some community agencies for changes because don't understand reality of FASDs-or there aren't community agencies for support in some important areas.
- * Inherent complications in hearings

How do we recognize individuals who may have an FASD?

- * There is no blood test or other simple test and diagnostic capacity for adults is limited
- * Therefore, a screen may be helpful. For example: the "Life History Screen"
- * In an ideal world, a positive screen would lead to assessment and diagnostic evaluation.
- * **Lacking that ability we need to modify approaches if we suspect an FASD**



Some “red flags” for me

- * History of alcohol abuse
- * History of family alcohol abuse
- * History of school issues. Drop out? Special ed? IEP?
- * Record shows large number of low-level or similar offenses
- * Demeanor in the courtroom. Appears not to take it seriously.

American and Canadian Bar Associations support accommodations for FASD

* AMERICAN BAR ASSOCIATION RESOLUTION 112B
ADOPTED BY THE HOUSE OF DELEGATES AUGUST 6-7,
2012

*
.....

* FURTHER RESOLVED, That the American Bar Association urges the passage of laws, and adoption of policies at all levels of government, that acknowledge and treat the effects of prenatal alcohol exposure and better assist individuals with FASD.

American and Canadian Bar Association support accommodations for FASD (continued)

- *Two ground-breaking resolutions of the Canadian Bar Association on Accommodating the Disability of FASD to Improve Access to Justice
 - *CBA Resolution 10-02-A (August 14-15, 2010)
 - *CBA Resolution 13-12-A (August 17-18, 2013)

We have to respond to the reality
that **RIGHT NOW** we are dealing
with individuals who are in danger
of being victimized by the justice
system for an invisible disability.

Turns out that the nationally respected goal of “Procedural Fairness” supports accommodations useful for those with an FASD.

*The Conference of Chief Justices/State Court Administrators recognizes the need:

*Whereas, a fundamental role of courts is to ensure fair processes and just outcomes for litigants; and

*Whereas, the constitutional guarantee of due process is designed to ensure that court decisions are through legally air procedures; and

*Whereas, extensive research demonstrates that in in addition to providing legal due process, it is important to meet the public's expectations regarding the process in order to increase positive public perceptions of the court system, reduce recidivism and increase compliance with court orders....

*SO, the Chief Justices and State Court Administrators conclude

***NOW, THEREFORE, BE IT RESOLVED THAT THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS ENCOURAGE THEIR MEMBERS TO TAKE A LEADERSHIP ROLE IN PROMOTING THE USE OF PROCEDURAL FAIRNESS PRINCIPLES IN THEIR COURT SYSTEMS.**

*Resolution 12, adopted July 31, 2013.

***The Latest Research shows “Procedural Fairness” leads to better results AND more acceptance by persons (even if they lost) if Judges follow 4 basic principles”¹ to ensure persons appearing in Court:**

¹National Judicial College Course “Advanced Bench Skills:
Procedural Fairness”
Anchorage, AK Sept. 12-14, 2018
Faculty: Judge (Ret.) David Suntag,
Judge Lisa Woodruff-White
Prof. Kelly Tait

- * Understood procedures & how decisions are made**
- * Had a chance to be heard and considered**
- * Were treated with respect and dignity**
- * Thought the judge was impartial and trying to be fair**

Some tips on judges' communication behaviors that support these outcomes from Prof. Kelly Tait (2018) (for all types of hearings):

- * Use Plain English whenever possible
- * Provide a Framework for hearing and expectations
- * Evaluate language level of written materials
- * Pause and make eye contact at key points
- * Slow down if person seems confused; “chunk” information

Some tips on judges' communication behaviors that support these outcomes from Prof. Kelly Tait (2018) (continued):

- * Greet people (whole courtroom when you enter and individuals in individual cases)
- * Thank them for coming and for cooperation; apologize if long wait
- * State at beginning that fairness is a goal
- * Remind yourself to have attitude of respect—it shows in your face, body, voice even if you are not aware of it.

Some tips on judges' communication behaviors that support these outcomes from Prof. Kelly Tait (2018) (continued):

- * Be explicit about reasons for choices made
- * Explain the decision, making it clear to both sides that arguments were heard and considered
- * Consciously use equivalent behaviors with each person (form of address, eye contact, body orientation, smiling, taking notes)
- * Use a neutral but open face (judge's "neutral expression" may look severe-as if judge has prejudged case)

CONSIDER THE COURT ENVIRONMENT

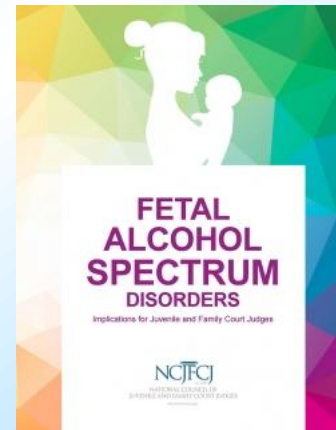
Do a personal “walk through” and assess:

- * Can people find the Court easily?
- * Is the signage understandable and welcoming?
- * Does the courtroom environment contain too many distractions?

* A terrific resource from
National Council of
Juvenile and Family Court
Judges

Credible and recent

www.ncjfcj.org/FASD-Guide



SOME FINAL POINTS...

- * We can't expect research as to our court to show how these accommodations actually help
- * *When we know the tremendous need and our ability to make a difference, is there any other choice??*
- * *Remember that the latest research shows....*

**MAKING
ACCOMMODATIONS FOR
FASD IN OUR
COURTROOMS MAKES
THEM BETTER FOR
EVERYONE!**

Questions?



Quyanakpak!

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