

S B

475

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to payment of legal services by indigent persons . . ."
 Sponsor: Senator Faiks
 Requestor: Senate Judiciary

Agency Affected: Dept. of Administration
 BRU: Public Defender Agency
 Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary) FY90 impact is zero.

This bill represents a positive emphasis on mitigating the public cost for an increasingly expensive criminal justice system. There is no fiscal impact on the Public Defender system, nor does the executive branch keep data which would enable a prediction of revenue.

Prepared by: John B. Salemi, Public Defender
 Division: Public Defender Agency
 Approved by Commissioner: Frank S. Baxter
 Agency: Department of Administration

Phone: 279-7541
 Date: 2/21/90
 Date: 2/22/90

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF LAW

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

December 14, 1989

The Honorable Warren Matthews
Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Dear Chief Justice Matthews:

We understand that the Supreme Court will soon consider a proposal to amend Criminal Rule 39 that would allow the recovery of some of the costs of defense services to indigent citizens.

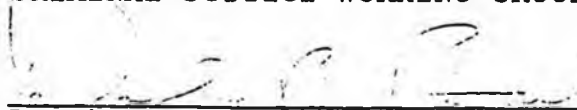
We support this concept, especially where the charges are directly related to the level of service provided to clients by the Alaska Public Defender's Agency and the Office of Public Advocacy. The fee schedule contained in the proposed amendment accomplishes this goal by setting out charges that are generally proportionate to the professional work required in individual cases.

We are particularly concerned that any recovery system include provisions designed to streamline the administrative and legal process for collection of these funds. The creation of an efficient and effective system holds the promise of recovering a significant portion of the high costs of defense services.

Finally, it is clear that the current mechanism of cost recovery has not worked. We applaud your efforts to develop a fair and effective recovery plan.

Respectfully submitted,

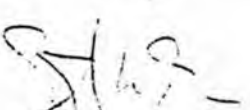
CRIMINAL JUSTICE WORKING GROUP



Douglas B. Bailly
Attorney General



Date



Brant McGee, Director
Office of Public Advocacy
Department of Administration



Date

[Handwritten initials]

1-10-90

John Salemi, Director Date
Public Defender Agency
Department of Administration

Myra W. Munson *Dec. 14, 1989*
Myra Munson, Commissioner Date
Department of Health and Social Services

Susan Humphrey-Barnett *12/27/89*
Susan Humphrey-Barnett, Commissioner Date
Department of Corrections

Art English *12-14-89*
Art English, Commissioner Date
Department of Public Safety

Duane Udland *12-20-89*
Duane Udland, Representative Date
Alaska Association of Chiefs of Police

BM/gh

Alaska State Legislature



Senate Judiciary Committee

MEMORANDUM

March 29, 1990

TO: All Senators

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. The courts have interpreted this to mean that a hearing must be held before an indigent person can be ordered to pay any expenses; calculating the value of the representation is difficult, and the ability of the court to fully consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender, regardless of the person's ability to pay some of the expenses at the time of the representation or in the future.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses (a copy of this schedule can be found in proposed Criminal Rule 39, which you will find attached). An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a

criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is enforceable, the state could pursue the judgement if the defendant had the ability to pay some of the fees at the time of the representation, or in the event that the defendant ever obtained a financial windfall in the future. Obviously, the state could not enforce the judgement in cases where the defendant was truly indigent and remained so.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

Alaska State Legislature



Senate Judiciary Committee

MEMORANDUM

February 22, 1990

TO: Judiciary Committee Members

FROM: Senator Jan Faiks, *Chairman*

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. This has been interpreted to mean that a hearing must be held before a court may order the indigent person to pay any expenses; the ability of the court to consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses. An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is kept alive, the state could enforce the judgement in the event that the defendant ever obtained a financial windfall. Obviously, it could not do so in cases where the defendant remains indigent.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

A M E N D M E N T # 1

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ". Upon a showing of financial hardship, the court shall allow a person subject to an order entered under this subsection to make payments under a payment schedule. The payment schedule may not exceed five years. Payments made under this subsection shall"

Page 1, lines 15 - 16:

Delete "] . The payments shall"

Insert ". THE PAYMENTS SHALL]"

A M E N D M E N T # 2

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 11, after "(c)":

Delete "The"

Insert "Upon the person's conviction, the"

A M E N D M E N T #3

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ", but execution may not commence until three years after
release of the defendant from incarceration"

6-2174E
Chenoweth
4/26/90

Original sponsor(s): SEN. FAIKS

1 IN THE SENATE

2 HOUSE CS FOR SENATE BILL NO. 475 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to payment of legal services and
7 related costs by indigent persons using the services
8 of the Public Defender Agency and the office of
9 public advocacy, and court-appointed counsel."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 * Section 1. AS 18.85.120(c) is repealed and reenacted to read:

12 (c) Upon the person's conviction, the court may enter a judgment
13 that a person for whom counsel is appointed pay for the necessary ser-
14 vices and facilities of representation and court costs, [but execution
15 of the judgment may ^{be delayed} ~~not commence~~ until three years after release of
16 the defendant from incarceration ~~unless for good cause shown, the~~
17 ~~court considers it appropriate to execute earlier.~~ Upon a showing of
18 financial hardship, the court shall allow a person subject to a judg-
19 ment entered under this subsection to make payments under a payment
20 schedule. Payments made under this subsection shall be paid into the
21 state general fund.

22 - all delayed 3 years, unless good cause shown

23 - all payable monthly, unless good cause for 3, 6, or 12 mos delay

Bailiff's failure to deliver a jury deadlock note to the trial judge precluded an opportunity to conduct proceedings on the record in defendant's presence and thus constituted reversible error. *Wamser v. State*, Op. No. 2571, 652 P2d 98 (Alaska 1982).

Where either prior to or immediately following the jury's verdict the court received a communication from the jury that they felt threatened by the presence of defendant's boyfriend, the court's failure to notify the defense of the communication was reversible error. *Newman v. State*, Op. No. 174, 655 P2d 1302 (Alaska App. 1982).

Failure to notify the defendant of a jury communication is constitutional error that requires reversal on appeal unless the error is found harmless beyond a reasonable doubt. *Jones v. State*, Op. No. 622, 719 P2d 265 (Alaska App. 1986).

Rule 38.1. Telephonic Participation in Criminal Cases.

(a) In any proceeding at which the defendant's presence is required under Criminal Rule 38(a), as modified by Rule 38.2, the defendant may waive the right to be present and request to participate by the telephone. The defendant's waiver of the right to be physically present may be obtained orally on the record or in writing. The court may allow telephonic participation of one or more parties, counsel or the judge at any proceeding in its discretion. The court may allow telephonic participation of witnesses at bail hearings, omnibus hearings, probation revocation hearings or at trial with the consent of the prosecution and the defendant. The court may allow telephonic participation of witnesses at other hearings in its discretion.

A motion to allow telephonic testimony in a grand jury proceeding must be submitted to the presiding judge of the judicial district or the presiding judge's designee. The motion must be accompanied by an affidavit of the prosecuting attorney which states the reasons telephonic testimony is requested. If telephonic testimony is allowed, the prosecuting attorney is responsible for ensuring that the requirements of Civil Rules 99(b)(3) are followed.

(b) The provisions of AS 12.35.015 shall govern the issuance of search warrants by telephone.

(Amended by SCO 622 effective June 15, 1985; by SCO 897 effective July 15, 1988; and by SCO 960 effective July 15, 1989).

Rule 38.2. Televised Appearance by Defendant.

(a) The Administrative Director of the Alaska Court System, after consultation with the presiding judge, Public Defender Agency, and Attorney General's Office, may enter into agreements with the Department of Public Safety and Department of Corrections which approve systems allowing judges to provide for the appearance by a defendant at certain criminal proceedings by way of television equipment in lieu of the physical presence of the

defendant in the courtroom. Such an agreement must provide for a procedure by which the defendant may confer with the defendant's attorney in private.

(b) In those court locations in which a television system has been approved by the supreme court and has been installed, in custody defendants shall appear by way of television for arraignment, pleas, and non-evidentiary bail reviews in traffic and misdemeanor cases; and initial appearance hearings, non-evidentiary bail reviews, and guilty plea arraignments in felony cases, unless otherwise ordered for cause stated by the presiding judge. With the defendant's consent, sentencings may be done by way of television in traffic and misdemeanor cases.

In any particular case, the trial court may order that the defendant be transported to court for court proceedings if the trial judge finds that the defendant's rights would be prejudiced by use of the system.

(c) Facsimile telecopy orders issued in proceedings conducted under this rule are acceptable as originals for the purposes of release or detention by correctional officers.

(d) Nothing in this rule diminishes any other existing right of a criminal defendant.

(Added by SCO 719 effective August 1, 1986; amended by SCO 863 effective July 15, 1988).

Rule 39. Appointment of Counsel.

(a) **Informing Defendant of Right to Counsel.** If the defendant appears for arraignment or trial without counsel, the court shall advise him of his right to have counsel, and shall ask him if he desires the aid of counsel.

(b) **Appointment of Counsel for Persons Financially Unable to Employ Counsel.**

(1) If

(i) the defendant states that

(aa) he desires the aid of counsel, and

(bb) he is financially unable to employ counsel, and

(ii) the court determines after inquiring of the defendant under oath as to his financial status that he is an "indigent person" as defined by statute, then the defendant is entitled to have counsel provided at public expense, and the court shall immediately notify the Alaska Public Defender Agency that the Agency has been appointed to represent the defendant and immediately appoint the Public Defender to represent the defendant. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court as required by statute.

(2) If the Agency has a conflict or is otherwise unable to represent the defendant, the court shall appoint counsel to represent him pursuant to statute.

(3) In the absence of a request by a defendant, otherwise entitled to appointment of counsel, the court shall appoint counsel for him unless he demonstrates that he understands the benefits of counsel and knowingly waives the same.

(4) The court, in its discretion, may appoint counsel in any case in which appointment best serves the interest of justice.

(c) Ability of Defendant to Pay Cost of Counsel — Determination by Court — Order — Execution.

(1) In any case in which the defendant is furnished counsel, either through the Public Defender Agency or private counsel appointed by the court, upon or prior to the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the defendant's present ability to pay all or a portion of the cost of representation.

(2) At the hearing, the defendant shall be entitled to have, but shall not be limited to

(i) the opportunity to be heard in person,

(ii) to present witnesses and other documentary evidence,

(iii) to confront and cross-examine adverse witnesses, and

(iv) disclosure of the evidence against him pertaining to his ability to pay for representation.

(3) If the court, after the hearing, determines that the defendant has the present ability to pay all or part of the cost, it may order payment of the sum to the state general fund or, if the defense costs were paid by a municipality, to that municipality in any installments and in a manner which it believes reasonable and compatible with the defendant's financial ability. The court shall file written findings, a copy of which shall be provided to the defendant. No default or failure in the making of any such payment shall in any way affect or reduce the rendering of services on appeal or any other phase of the defendant's case. The order shall not be enforceable by contempt. Execution on the order is to be made by the attorney general, or the municipality which paid for the defense costs, in the same manner as on a judgment in a civil action.

(4) The cost of services of counsel shall be calculated at the hourly rate provided in Administrative Rule 12(d)(2)(F). At the hearing, counsel for the defendant shall provide evidence of:

(i) the hours he or she has expended to date;

(ii) an estimate of the hours, if any, still required to be expended on behalf of the defendant; and

(iii) any costs and expenses that are expected to be incurred or that have actually been incurred by private counsel or by the Public Defender Agency, including a reasonable estimate of the cost to the Public Defender Agency of any services provided on behalf of the defendant by investigators employed by the Public Defender Agency. Reimbursement for costs and expenses incurred by private counsel shall not exceed \$250.00 unless authorization was obtained in advance in accordance with Administrative Rule 12(d)(2)(G) and (H).

(5) Prior to the furnishing of counsel in the trial court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of representation. The court shall also give notice that, if the court determines that the defendant has such present ability, the court may order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

(6) In making a determination of the defendant's present ability to pay all or a portion of the cost of representation, the court shall take into account the defendant's current income, assets and obligations, including necessary living expenses of the defendant and his dependents, if any. The defendant may not be required to pay any amount, or to liquidate any property that would be exempt from execution by law.

(7) The court may refer matters under section (c) of this rule to a master.

(Adopted by SCO 4 October 4, 1959; amended by SCO 90 Effective July 24, 1967; by SCO 157 effective February 15, 1973; by Amendment No. 4 to SCO 157 dated March 12, 1973; by SCO 187 effective July 2, 1974; by SCO 328 effective January 1, 1979; by SCO 448 effective November 24 1980; by SCO 677 effective June 15, 1986; and by SCO 888 effective July 15, 1988)

Annotations

Cases

- I. Right to Counsel
 - A. In General
 - B. Indigents
- II. Waiver of Right to Counsel
- III. Effective Assistance of Counsel

- I. Right to Counsel
 - A. In General

A defendant in a criminal proceeding has a constitutional right to court appointed counsel at a preliminary hearing only when the preliminary hearing is in the nature of a critical stage of the proceeding. *Merrill v. State*, No. 392, 423 P2d 686 (Alaska 1967).

Where the court over defendant's explicit protest, dismisses counsel from a public defender agency on the belief that the agency has exhibited a lack of preparation and then appoints unwanted counsel to represent the defendant, the court deprives the defendant of his right to counsel of his choice. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Where a defendant has been denied the right to be represented by his chosen counsel, the subsequent entry of a plea of guilty or *nolo contendere* does not shield a conviction from challenge on appeal, since the voluntariness and reliability of such a plea is inherently suspect. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

The advice given to a nonindigent defendant concerning the right to counsel must include at least a brief explanation of the benefits of counsel. *Swensen v. Municipality of Anchorage*, Op. No. 2279, 616 P2d 874 (Alaska 1980).

It is within the court's discretion to allow both defendant and counsel to participate actively in the trial, so that a defendant may represent himself and also have the assistance of counsel. *Cano v. Municipality of Anchorage*, Op. No. 20, 627 P2d 660 (Alaska 1980).

B. Indigents

Even when read in relation to recent United States Supreme Court decisions, AS 12.25.150(b) does not require the appointment of counsel for an indigent immediately after his arrest. *Martinez v. State*, Op. No. 389, 423 P2d 700 (Alaska 1967).

Mere speculation as to what might have been done by a defense counsel during an interval between arrest and appearance for arraignment when counsel was assigned cannot be a basis for inferring that indigent defendant in a criminal case was deprived of counsel during a critical stage of the proceedings. *Martinez v. State*, Op. No. 389, 423 P2d 700 (Alaska 1967).

Where the direct penalty for conviction of an offense may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, such offense is a "serious crime" within the public defender statute. A defendant who is charged with any such misdemeanor and who cannot afford to hire his own lawyer is eligible for representation by a public defender. *Alexander v. City of Anchorage*, Op. No. 738, 490 P2d 910 (Alaska 1971).

A indigent defendant is not entitled to representation by any particular attorney. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Once counsel is appointed to represent an indigent defendant, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

II. Waiver of Right to Counsel

To be valid, a waiver of the right to counsel must be made with an apprehension of the nature of the charges, the offenses included within them, the range of punishments, possible defenses, mitigating circumstances and all other facts essential to a broad understanding of the whole matter. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Magistrate must ascertain whether defendant understands benefits of counsel by recorded colloquy with defendant before right to counsel may be waived. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant is unable to make an intelligent choice as to waiver of right to counsel it is the duty of the court to assign counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant pleads guilty without the assistance of counsel, the plea is invalid unless defendant waived his right to counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Failure of arraignment or trial record to demonstrate that defendant understood what he was giving up by declining the assistance of counsel was cause for reversal even though record

showed that defendant had been advised of his right to counsel. *O'Dell v. Municipality of Anchorage*, Op. No. 1588, 576 P2d 104 (Alaska 1978).

Failure of court to ask questions of defendant to assure that he understood precisely what rights he was giving up by declining legal representation at sentencing hearing required vacation of sentence. *Smith v. State*, Op. No. 134, 651 P2d 1191 (Alaska App. 1982).

Trial judge committed reversible error in not allowing defendant, charged with drunk driving in 1984, to have a 1975 drunk driving conviction set aside on the ground that, although informed by the magistrate taking his guilty plea in 1975 of his right to an attorney, he was not informed of what an attorney could do for him. *Petranovich v. State*, Op. No. 547, 709 P2d 867 (Alaska App. 1985).

Failure of the trial court to assure by an on-the-record inquiry that the accused understood the benefits of counsel and the dangers of self-representation prior to waiving his right to counsel was reversible error notwithstanding the accused's previous contacts with the criminal justice system. *James v. State*, Op. No. 669, 730 P2d 811 (Alaska App. 1987).

Defendant's waiver of his right to counsel prior to pleading guilty to a DWI charge was valid where the magistrate advised him of the maximum and minimum penalties for the offense and after he responded affirmatively to the question: "Do you know what a lawyer is?" *Tobuk v. State*, Op. No. 683, 732 P2d 1099 (Alaska App. 1987).

III. Effective Assistance of Counsel

A defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undelighted by conflicting considerations. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

All that is required of counsel in rendering effective assistance of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant does not suffer an unconstitutional deprivation of effective assistance of counsel because of an error committed by his attorney which in no manner contributes to the conviction. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant who has not demonstrated that he understands the benefits of counsel cannot be said to have waived counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Rule 40. Time.

(a) **Computation.** Except as otherwise specifically provided in these rules, in computing any period of time, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When a period of the prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. *Ahritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

Where in a personal injury action the defendant had filed a payment document which, in itself, could be considered at best a deposit in court under Civil Rule 67(a) but by stipulation between the parties was converted into an offer of judgment, and by virtue of such stipulation and the court's order appended thereto, plaintiff's causes of action were dismissed with prejudice, the action had been settled pursuant to Civil Rule 68 and under the "with costs then accrued" portion of said rule the trial court was vested with wide discretion in determining award of attorney's fees. *Ahritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

If the judgment recovered at trial is less than an offer of judgment, the offeror is liable for the costs incurred by the offeror subsequent to the time the offer was made. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

For purposes of this rule, an offer of judgment that specifies only a total sum must be construed as including the defendant's assessment of all the damages that the plaintiff is entitled to, including that occasioned by the loss of the use of the money. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

An offer of judgment will be construed as including the defendant's assessment of all the damages that plaintiff is entitled to, including costs and attorney's fees. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

An award of costs and attorney's fees to both the plaintiff and the defendant are properly computed as of the date the offer of judgment is made and not at a later time when accepted. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

Where radically different standards of partial compensation are applied in awarding attorney's fees to the parties, the award will be considered an abuse of discretion unless there are findings or an explanation by the trial court supporting such disparate treatment. *Irving v. Bullock*, Op. No. 1261, 549 P2d 1184 (Alaska 1976).

This rule does not require that costs incurred prior to an offer of judgment be awarded; such awards are within the trial court's discretion. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

An award of \$5,000.00 for attorney's fees to defendant, a "limited prevailing party" under Civil Rule 68, was not manifestly unreasonable when actual attorney's fees were \$14,053.12, considering that Rule 68 is designed to encourage reasonable settlement after a lawsuit is filed. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

An award of attorney's fees under Civil Rule 68 is designed to "partially" compensate the prevailing party. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

Court should make factual determination of offeror's actual expenses incurred after offer of judgment, then take into account the partial recovery principles of Civil Rule 82 in making of reasonable partial attorney's fees and costs determination. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 206 (Alaska 1979).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. *Truckweld Equipment Co. v. Swenson Trucking*, Op. No. 2545, 649 P2d 234 (Alaska 1982).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended

and a brief description of the services reflected by those hours, will be submitted. *Hayes v. Arroy Corp.*, Op. No. 3045, 718 P2d 100 (Alaska 1986).

Prevailing defendant was entitled to costs incurred after date of his offer of judgment. *Hutchins v. Schwab*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

As the prevailing party at trial, defendant could receive maximum amount of attorney fees under Civil Rule 82, the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. *Hutchins v. Schwab*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

B. Prejudgment Interest

The phrase "judgment finally obtained" by the offeror" under this rule includes the amount assessed as prejudgment interest; does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in its "judgment finally obtained by the offeror" and to compare that total to the amount of the offer of judgment in order to determine whether the offeror should pay the costs. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offer of judgment on a judgment from the date of the offer through date of judgment when offeror ultimately recovers less than amount offered. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees — including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 206 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. *Farnsworth v. Steiner*, Op. No. 2454, 638 P2d 181 (Alaska 1981).

Rule 69. Execution—Examination of Judgment Debtor—Restraining Disposition of Property—Execution After Five Years.

(a) Execution — Discovery. Process to enforce a judgment shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with these rules and

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applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest, when that interest appears of record, may obtain recovery from any person, including the judgment debtor, in the manner provided in these rules.

(b) Examination of Judgment Debtor in Court.

(1) Before or after the issuing of an execution against property, the judgment debtor may be made to appear before the court, or before a master appointed by such court, at a time and place specified by an order, and to answer under oath all questions concerning property the judgment debtor has which may be subject to execution. The court may also order the debtor to bring to the examination documents concerning property which may be subject to execution.

(2) The examination may be reduced to writing and filed with the clerk by whom the execution was issued. Either party may examine witnesses in his behalf. If by such examination it appears that the judgment debtor has any property liable to execution the court shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on by execution, or both, as may seem most likely to effect the object of the proceeding.

(c) Order Restraining Disposition of Property. At the time of allowing the order prescribed in subdivision (b)(1) of this rule or at any time thereafter pending the proceeding, the court may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution pending the proceeding. For disobeying any order or requirement authorized by this rule the judgment debtor may be punished as for a contempt.

(d) Execution After Five Years. Whenever a period of five years shall elapse after the entry of a judgment without an execution being issued thereon, no execution shall issue except on order of the court in the following manner:

(1) The judgment creditor shall file a motion supported by affidavit with the court where the judgment is entered for leave to issue an execution. The motion and affidavit shall state the names of the parties to the judgment, the date of its entry, the reasons for failure to obtain the writ within five years after the entry of judgment and the amount claimed to be due thereon or the particular property of which possession was adjudged to the judgment creditor remaining undelivered.

(2) At any time after filing such motion and affidavit the judgment creditor may cause a summons to be served on the judgment debtor in accordance with the provisions of Rule 4. In the event the judgment debtor is deceased, the summons may be

served upon his representative. The summons shall state the amount claimed or the property sought to be recovered under the judgment.

(3) The judgment debtor, or, in the event of his death, his representative, may file and serve a verified answer to such motion within the time allowed to answer a complaint, alleging any defense to such motion which may exist. The judgment creditor may file and serve a verified reply to such answer. The judgment debtor waives all defenses and objections which he does not present by answer as herein provided.

(4) The order shall specify the amount for which execution is to issue, or the particular property possession of which is to be delivered.

(5) At the time of filing the motion for leave to issue execution or at any time thereafter before the final order is entered, the judgment creditor may cause the property of the judgment debtor to be attached and held during the time said motion is pending and until the final order is entered. Such attachment shall be made in accordance with these rules and applicable statutes, and for the purpose of such attachment the judgment shall be deemed an implied contract for the direct payment of money. In the event that the court shall order that execution be issued, it shall further order that any property of the judgment debtor attached hereunder shall be sold for the satisfaction of such execution and the peace officer shall apply the property attached by him or the proceeds thereof upon the execution.

(e) Multiple Executions.

(1) Only one original writ of execution and one original writ of execution for garnishment of earnings may be issued and outstanding at any one time except:

(a) An additional writ of execution may be issued while another is outstanding if either of the writs is to be served on the Department of Revenue to seize the debtor's Alaska Permanent Fund Dividend; or

(b) Additional writs may be issued if the creditor alleges facts by affidavit which show there is property which cannot be served by the process server holding an outstanding writ because the property is outside the community in which the process server is authorized to operate and there is good cause to believe the debtor may remove or dispose of the property unless immediate action is taken.

(2) A process server to whom a writ of execution is issued may make copies of the writ as necessary. However, no writ or copies may be transferred to another process server except within the same firm. If the creditor discovers property which could be seized under the writ in another community in which the original process server does not serve, the outstanding writ must be returned to the court so

that the clerk of court can cancel the first writ and issue a new writ to a process server serving the other community.

(f) **Return of Writ of Execution.** A process server who receives money as a result of a levy must deliver the money and a return of service to the court on the next day of business after receipt. The process server must file the original writ unless the money received by the server will satisfy only part of the judgment and the server expects to seize more money or property with the writ. In this situation, the process server may make a partial return by delivery to the court of all money received, a return of service and a copy of the writ. The original writ must be returned to the court when the process server no longer expects to seize more money or property with the writ.

(g) **Confirmation of Sale of Real Property on Execution — Objections — Disposition of Proceeds.**

(1) *Confirmation.* Where real property has been sold on execution the plaintiff in the writ of execution, on motion, is entitled to have an order confirming the sale, after the expiration of 10 days after the filing of the return of sale, unless the judgment debtor has filed objections to the sale within 10 days after the filing of the return of sale.

(2) *Objections.* If objections are filed the court shall determine at a hearing whether there were substantial irregularities in the proceedings of sale which caused probable loss or injury to the judgment debtor. If not, the order confirming the sale shall be granted. If so, the court shall deny the motion and direct that the property be resold, in whole or in part as upon an execution received of that date.

(3) *Disposition of Proceeds of Sale.* After entry of an order confirming the sale of real property, the clerk shall apply the proceeds of the sale, or so much thereof as may be necessary, in satisfaction of the judgment and costs. Any proceeds remaining shall be paid to the judgment debtor. Such payments shall be made prior to the entry of the order of confirmation if the judgment debtor files with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale.

(Adopted by SCO 5 October 9, 1959; amended by SCO 56 effective November 1, 1963; by SCO 258 effective November 15, 1976; by SCO 465 effective June 1, 1981; by SCO 675 effective June 15, 1986; and by SCO 721 effective December 15, 1986)

Cross References

CROSS REFERENCES: AS 09.30.030; AS 09.35.010 — AS 09.35.330

(a) CROSS REFERENCE: AS 09.35.010

(b)(1) CROSS REFERENCES: AS 09.35.070 — AS 09.35.090

(d)(1) CROSS REFERENCES: AS 09.35.020

(d)(2) CROSS REFERENCES: AS 09.35.060

(e)(1) CROSS REFERENCE: AS 09.35.180

(e)(2) CROSS REFERENCES: AS 09.35.180

Annotations

Cases

Offset bid of \$2000 on a judgment of \$388.13 was a substantial irregularity having a natural tendency to deter the right to redress and was therefore a proper consideration in trial judge's decision to set aside execution sale. *Law Offices of Murphy L. Clark v. Altman*, Op. No. 2811, 680 P2d 1125 (Alaska 1984).

Rule 70. Judgment for Specific Acts— Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

(Adopted by SCO 5 October 9, 1959)

Annotations

Cases

An order pursuant to Civil Rule 70 compelling a vendor to comply with a purchaser's request was erroneous to the extent that it required more of the vendor than was required by the underlying judgment and agreement. *Byrnes v. Mercier*, Op. No. 1804, 590 P2d 906 (Alaska 1979).

Rule 71. Process in Behalf of and Against Persons Not Parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party, and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

(Adopted by SCO 5 October 9, 1959)

Rule 72. Eminent Domain.

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain shall be governed by these rules, except as otherwise provided in this rule.

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Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

NOTES TO DECISIONS

"Person" is defined without regard to place of habitation. *Adams v. Pipeliners Union 798*, Sup. Ct. Op. No. 2936 (File No. S-181), 699 P.2d 343 (1985).

"Employer". — A federal credit union with membership open to military and civilian personnel at Elmendorf, Adak and Shemya military bases, members of the Air National Guard, senior members of the Civil Air Patrol, shareholders in 10 native regional corporations, and employees of certain contractors of Alyeska Pipeline Service Company was held to be an "employer" within the meaning of paragraph (4) of this section and not entitled to an exclusion as a "fraternal organization." *Alaska USA Fed. Credit Union v. Fridriksson*, Sup. Ct. Op. No. 2478 (File No. 5230), 642 P.2d 804 (1982).

Paragraph (12) does not include membership organizations. — Since paragraph (12) should not be construed to

encompass a membership organization such as the Jaycees, the exclusion of women from full membership in the Jaycees does not violate AS 18.80.230. *United States Jaycees v. Richardet*, Sup. Ct. Op. No. 2682 (File Nos. 5889, 5890), 666 P.2d 1008 (1983).

"Place". — According to the common and approved usage of the term "place," it would not encompass a service organization lacking a fixed geographical situs. *United States Jaycees v. Richardet*, Sup. Ct. Op. No. 2682 (File Nos. 5889, 5890), 666 P.2d 1008 (1983), construing paragraph (7) defining "public accommodation."

Applied in *Morris v. City of Soldotna*, Sup. Ct. Op. No. 1296 (File No. 2286), 553 P.2d 474 (1976).

Cited in *Brown v. Wood*, Sup. Ct. Op. No. 1551 (File Nos. 2564, 2565), 575 P.2d 760 (1978).

Chapter 85. Public Defender Agency.

Section

- 10. Public defender agency established
- 20. Administration
- 30. Appointment and term
- 40. Removal
- 50. Vacancy
- 60. Eligibility
- 70. Private practice prohibited
- 80. Delegation of functions
- 90. Agency staff
- 100. Right to representation, services and facilities

Section

- 110. Notice and provision for representation
- 120. Determination of indigency
- 130. Contracts with private attorneys
- 140. Waiver
- 150. Recovery from defendant
- 155. Payment by municipality
- 160. Records and reports
- 170. Definitions
- 180. Short title

Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 809, 810. 23 C.J.S., Criminal Law, §§ 978, 979(1).

Construction and effect of statutes providing for office of public defender. 36 ALR3d 1403.

Sec. 18.85.010. Public defender agency established. There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants. (§ 1 ch 109 SLA 1969; am Executive Order No. 42 § 2 (1980))

NOTES TO DECISIONS

Applied in Alaska Pub. Def. Act (1978); Alaska Legal Servs. Corp. v. Agency v. Superior Court, Sup. Ct. Op. Thomas, Sup. Ct. Op. No. 2292 (File No. No. 1733 (File No. 3842), 584 P.2d 1106 4482), 623 P.2d 342 (1981).

Sec. 18.85.020. Administration. The agency is administered by the public defender. (§ 1 ch 109 SLA 1969)

Sec. 18.85.030. Appointment and term. The governor shall appoint the public defender from among two or more persons nominated for that position by the judicial council. The appointment is subject to confirmation by majority of the members of the legislature in joint session. The public defender shall serve a term of four years. If the governor decides to retain the public defender for another term the governor need not call for nominations from the judicial council; however, the retention must be approved by a majority of the members of the legislature in joint session. (§ 1 ch 109 SLA 1969)

Sec. 18.85.040. Removal. The public defender is subject to removal by the governor for good cause. If the public defender is removed, the governor shall submit to the legislature a report stating the reasons for removal. The report shall be submitted within 10 days after the action has been taken if the legislature is in session, or if the legislature is not in session, within 10 days after the convening of the next regular or special session. (§ 1 ch 109 SLA 1969)

Sec. 18.85.050. Vacancy. If the position of public defender becomes vacant for any reason, the governor may appoint an acting public defender to serve until the regular appointment procedures under AS 18.85.030 are complied with. The governor and the judicial council shall act under AS 18.85.030 as soon as possible after the vacancy occurs. A person appointed under that section to fill a vacancy begins a new four-year term. (§ 1 ch 109 SLA 1969)

Sec. 18.85.060. Eligibility. A person is not eligible to be the public defender or an assistant public defender unless admitted to the practice of law in this state or, with the approval of the Board of Governors of the Alaska Bar Association, in another state. (§ 1 ch 109 SLA 1969)

Sec. 18.85.070. Private practice prohibited. The public defender and assistant public defenders shall devote all of their time to the duties of their respective offices and may not engage in the practice of law except in their official capacities in the agency. (§ 1 ch 109 SLA 1969)

Sec. 18.85.080. Delegation of functions. The public defender may assign the functions vested in the public defender or in the agency to subordinate attorneys and employees. (§ 1 ch 109 SLA 1969)

Sec. 18.85.090. Agency staff. The public defender may appoint and remove assistant public defenders, clerks, investigators, stenographers and other employees the public defender considers necessary to enable the public defender to carry out the responsibilities of the public defender, subject to existing appropriations. Each person appointed to a subordinate position established by the public defender is under the supervision and control of the public defender. (§ 1 ch 109 SLA 1969)

Cross references. — For provisions the partially exempt service, see AS applicable to persons holding positions in 39.25.120(c)(5).

Sec. 18.85.100. Right to representation, services and facilities.
 (a) An indigent person who is being detained by a law enforcement officer in connection with a serious crime, or is under formal charge of having committed, or is being detained under a conviction of a serious crime, or is on probation or parole, or is entitled to representation under the Supreme Court Rules of Children's Procedure, or against whom commitment proceedings for mental illness have been initiated, is entitled

(1) to be represented by an attorney to the same extent as a person retaining an attorney is entitled; and

(2) to be provided with the necessary services and facilities of this representation, including investigation and other preparation.

(b) Subject to the provisions of AS 18.85.155, the attorney services and facilities and the court costs shall be provided at public expense to the extent that the person, at the time the court determines indigency, is unable to provide for payment without undue hardship. Appointment of any guardian ad litem or attorney shall be made under the terms of AS 25.24.310, to the extent that that section is not inconsistent with the requirements of this chapter. [§ 1 ch 109 SLA 1969; am § 1 ch 16 SLA 1974; am § 3 ch 167 SLA 1975; am § 1 ch 125 SLA 1984)

Effect of amendments. — The 1984 amendment added "Subject to the provisions of AS 18.85.155" at the beginning of the first sentence in subsection (b).

Opinions of attorney general. — If the individual is represented by the public defender agency pursuant to this section, AS 18.85.110(d) and 18.85.120 and if the

expense is a necessary incident of representation, then any necessary transportation expenses that may properly be authorized at public expense should be paid by the public defender agency pursuant to this section. October 7, 1977 Op. Att'y Gen.

If the individual is represented by a

running the courts, which are attributable to prosecutions initiated by the political subdivision. Since the cost of providing counsel seems indistinguishable from the cost of providing these judicial services, it should be treated in the same way. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

A trial court cannot order Alaska Legal Services Corporation to reimburse the state for attorney's fees paid by the state to counsel appointed for an indi-

gent defendant when Alaska Legal Services represents the plaintiff. *Alaska Legal Servs. Corp. v. Thomas*, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Tests to determine effectiveness of counsel. — See *McCracken v. State*, Sup. Ct. Op. No. 1028 (File No. 1498), 521 P.2d 499 (1974).

Quoted in *Flores v. Flores*, Sup. Ct. Op. No. 1875 (File No. 3832), 598 P.2d 893 (1979).

Sec. 18.85.110. Notice and provision for representation. (a) If a person having a right to representation under AS 18.85.100 is not represented by an attorney, the law enforcement officers concerned, upon commencement of detention, or the agency, or the court, as the case may be, shall

(1) clearly inform the person of the right of an indigent person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the agency or the court, as appropriate, that the person is not so represented.

(b) In (a) of this section "commencement of detention" includes the taking into custody of a probationer or parolee.

(c) Upon commencement of a later judicial proceeding relating to the same matter, the court shall clearly inform the person detained or charged of the right of an indigent person to be represented by an attorney at public expense.

(d) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the agency or the office of public advocacy.

(e) Upon notification or assignment under this section, the agency or the office of public advocacy shall represent the person with respect to whom the notification or assignment is made.

(f) If the agency, before consideration by the court, determines that the person is entitled to be represented by an attorney at public expense, it shall promptly undertake representation. (§ 1 ch 109 SLA 1969; am §§ 9, 10 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "or the office of public advocacy" for "or assign a private attorney for him under AS 18.85.130" in subsection (d) and "or the office of public

advocacy" for "or assigned private attorney" in subsection (e).

Cross references. — For right to counsel, see Crim. Rules 5(c), 15(c) and 39.

NOTES TO DECISIONS

Applied in Alaska Legal Servs. Corp. v. Thomas, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Quoted in Plant v. State, Ct. App. Op. No. 500 (File No. 7734, A-37), P.2d (1985).

Sec. 18.85.120. Determination of indigency. (a) The determination of a person's indigency shall be made by the court in which an action against the person is pending.

(b) In determining whether a person is indigent and in determining the extent of the person's inability to pay, the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents. Release on bail does not preclude a finding that a person is indigent. In each case, the person, subject to the penalties for perjury, shall certify under oath, and in writing or by other record, material factors relative to the person's ability to pay that the court prescribes.

(c) To the extent that a person is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order the person to pay for these items. The payments shall be paid into the state general fund.

(d) As a condition of receiving services under this chapter, a person shall affirm indigency under oath to the court and execute a general waiver authorizing the release to the court of income information regarding any income source the person has had for a period of three years immediately preceding the person's first court appearance in connection with each cause. At the conclusion of all services by the public defender to the person, the court shall upon request release to the attorney general all information received under this subsection except information that might incriminate or tend to incriminate the person. (§ 1 ch 109 SLA 1969; am § 2 ch 16 SLA 1974; am § 17 ch 208 SLA 1975)

Cross references. — For determining party's financial inability to employ counsel, see Crim. Rule 39(c).

Sec. 18.85.130. Contracts with private attorneys. When the public interest requires, and a person is entitled to representation by the agency under this chapter, the public defender may contract with one or more private attorneys to assist the public defender. Except as provided in AS 18.85.155, the public defender shall pay for these services out of appropriations to the agency. (§ 1 ch 109 SLA 1969; am § 3 ch 16 SLA 1974; am § 11 ch 55 SLA 1984; am § 2 ch 125 SLA 1984)

Cross references. — As to appointment of counsel, see C.im. Rule 39. As to compensation of court appointed attorneys, see Admin. Rule 15.

Effect of amendments. — The first 1984 amendment rewrote the catchline, which formerly read "Substitute defender," repealed former subsection (a), relating to the appointment of an attorney other than the public defender, and, in the

remaining language, deleted the subsection designation "(b)," and in the present first sentence deleted "In addition to substitution under (a) of this section" at the beginning and substituted "the public defender" for "him" at the end of the first sentence.

The second 1984 amendment added "Except as provided in AS 18.85.155" at the beginning of the last sentence.

NOTES TO DECISIONS

Applied in *Alaska Legal Servs. Corp. v. Thomas*, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Sec. 18.85.140. Waiver. A person who has been appropriately informed under AS 18.85.100 may waive in writing, or by other record, any right provided by this chapter, if the court concerned, at the time of or after waiver, finds of record that the person has acted with full awareness of the person's rights and of the consequences of a waiver. The court shall consider such factors as the person's age, education, familiarity with the English language and the complexity of the crime involved in making the finding. (§ 1 ch 109 SLA 1969)

Sec. 18.85.150. Recovery from defendant. (a) A person who has received assistance under this chapter shall pay the state for the assistance if the person was not entitled to it at the time indigency was determined.

(b) The attorney general may bring an action on behalf of the state to recover payment from a person described in (a) of this section who refuses to make the payment. The action shall be brought within six years after the conclusion of the proceeding for which the assistance was provided.

(c) *[Repealed, § 5 ch 16 SLA 1974.]*

(d) Amounts recovered under this section shall be paid into the state general fund. (§ 1 ch 109 SLA 1969; am §§ 4, 5 ch 16 SLA 1974)

Sec. 18.85.155. Payment by municipality. (a) When a municipality prosecutes a person who has been determined by the court to be indigent under AS 18.85.120 for a violation of a municipal ordinance that is a serious crime, the municipality shall pay for the services of the attorney appointed by the court to defend the indigent person.

(b) A municipality shall provide for defense attorney services under (a) of this section by contracting with private attorneys or the Alaska Public Defender Agency or by establishing a municipal public defense agency.

(c) In a prosecution subject to this section, the court may order the defendant to pay to the municipality the costs of the attorney services and other court costs to the extent that the defendant is able to do so. (§ 3 ch 125 SLA 1984)

Sec. 18.85.160. Records and reports. (a) The public defender shall keep appropriate records respecting each needy person represented by the agency under this chapter.

(b) The public defender shall submit an annual report to the legislature and supreme court showing the number of persons represented under this chapter, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed on the agency by this chapter. (§ 1 ch 109 SLA 1969)

Sec. 18.85.170. Definitions. In this chapter

(1) "agency" means the public defender agency created by AS 18.85.010;

(2) "detain" means to have in custody or otherwise deprive of freedom of action;

(3) "expenses," when used with reference to representation under this chapter, includes an expense of investigation, other preparation, and trial;

(4) "indigent person" means a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter;

(5) "serious crime" includes

(A) a criminal matter in which a person is entitled to representation by an attorney under the Constitution of the State of Alaska or the United States Constitution;

(B) an act that, but for the age of the person involved, would otherwise be a serious crime. (§ 1 ch. 109 SLA 1969)

NOTES TO DECISIONS

The public defender agency is to act in criminal matters, and a criminal matter under this section is one in which a person is entitled to representation either under the state or federal constitutions. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

"Serious crime". — Since an indigent

defendant is entitled to representation by counsel when prosecuted for an offense the direct penalty for which may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, it follows that any such offense is a serious matter and a "serious crime" within the meaning of the Public Defender Act (AS 18.85.010 et seq.). Therefore, a defen-

dant charged with any such misdemeanor who cannot afford to hire his own lawyer is eligible for representation by the public defender. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

The supreme court has defined a "criminal prosecution" as any offense for which incarceration could be a direct penalty, and from this definition have flowed the rights to jury trial and court-appointed counsel in misdemeanor cases, based upon constitutional considerations. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Under paragraph (5)(A), the public defender is empowered to represent an indigent defendant in a civil contempt for nonsupport proceedings. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Although the legislature, at the time of enactment of this chapter, may not have foreseen the development of the law in the area of enforcement of child support orders and, therefore, might not have foreseen the precise application of this chapter to defendants in contempt for nonsupport proceedings, there is no indication that it intended to exclude this class of defendants from representation. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

The offense of harassment as defined in an ordinance was not a "serious crime" within the meaning of AS 18.85.170(5), where no provision had been made for imprisonment for violation of the ordinance and the maximum punishment was a \$100.00 fine; harassment did not connote traditional criminal conduct; and contemporary social values were not so offended as to cause the conduct involved to connote criminality in the constitutional sense. Therefore, the Alaska Public Defender Agency had no authority to represent a person who was accused of this offense. *Alaska Pub. Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1733 (File No. 3842), 584 P.2d 1106 (1978).

Payment of costs. — Based upon AS 22.15.270, most of the major political subdivisions of the state have entered into contractual arrangements with the Alaska court system whereby the political subdivision has agreed to pay the salaries of the district judges, and all other costs of running the courts which are attributable to prosecutions initiated by the political subdivision. Since the cost of providing counsel seems indistinguishable from the cost of providing these judicial services, it should be treated in the same way. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

Sec. 18.85.180. Short title. This chapter may be cited as the Public Defender Act. (§ 1 ch 109 SLA 1969)

Chapter 90. Alaska King Crab Marketing and Quality Control Act.

[Repealed, § 6 ch 106 SLA 1981. For current law see AS 16.51.010 — 16.51.180.]

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Criminal Rule 39
concerning appointment of
counsel for indigents.

IT IS ORDERED:

Criminal Rule 39 is amended to provide:

Criminal Rule 39: Appointment of Counsel.

(a) Informing Defendant of Right to Counsel. The court shall advise a defendant who appears for arraignment or trial without counsel of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) Appointment of Counsel for Persons Financially Unable to Employ Counsel.

(1) If the defendant desires the aid of counsel but claims a financial inability to employ counsel, the court shall inquire of the defendant under oath as to his or her financial status in order to determine whether the defendant is an "indigent person," as defined by statute. The court shall advise the

defendant that a judgment will* be issued against the defendant to cover the costs of an appointed counsel. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court. The court also may require the defendant to sign an assignment of the defendant's permanent fund dividend check to the state and may enter such orders as appear reasonably necessary to prevent the defendant from fraudulently dissipating assets to avoid a repayment order.

(2) Information provided by the defendant concerning eligibility for appointed counsel may not be used against the defendant in any criminal proceedings, except that such information may be used in a prosecution for perjury or at a hearing for determining the defendant's ability to pay a fine or make restitution. Upon request, the defendant must be allowed to present the requested financial information in a confidential setting, outside the presence of the prosecuting attorney. The court may have the financial inquiry conducted by pretrial services.

(3) If the court determines that the defendant is an "indigent person," the

* The alternative draft, under which the court would hold an "ability to pay" hearing if requested before imposing costs, would substitute "may" for "will" here.

court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment. The court may require the defendant to attempt to arrange private representation before making a final decision on indigency.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies the defendant's request for appointed counsel, the defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days of the trial court's denial of representation. The trial court shall forward the motion, relevant materials from the court file and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) Cost of Counsel.

(1) At the conclusion of the criminal proceedings in the trial court, the court or the clerk shall issue a judgement against a defendant represented by appointed

counsel for the cost of representation. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e).**

(2) The court may require payment in installments or in any manner which the court finds is reasonable. The judgment of repayment must be in writing and a copy must be provided to the defendant.

(3) All proceedings to enforce a repayment judgment are civil in nature. The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution. The judgment is not enforceable by contempt, nor may repayment be made a condition

** The alternative draft would replace this subparagraph with two subparagraphs which would provide:

(1) At the beginning or conclusion of the criminal proceedings in the trial court, the court may order a defendant represented by appointed counsel to pay all or part of the costs of representation in an amount not to exceed the defendant's ability to pay for these costs. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e). A defendant with only a partial ability to pay costs may be ordered to pay one-half of the amount specified in the fee schedule.

(2) Prior to entering an order of repayment, the court shall advise the defendant that he or she may present testimonial and documentary evidence concerning an ability to pay for representation.

of a defendant's probation. Default or failure to make repayment may not affect or reduce the rendering of services on appeal or any other phase of the defendant's case in any way. The defendant does not have a right to be represented by appointed counsel in connection with any repayment proceeding.

(d) Appointment in the Interest of Justice. The court may appoint counsel for a criminal defendant in any case in which appointment best serves the interest of justice.

(e) Cost of Representation Schedule. The following schedules govern the assessment of the cost of representation under subparagraph (c)(1):

Misdemeanors

Trial	\$ 500.00
Change of plea	200.00
Dismissal after substantive motion	200.00
Dismissal without substantive motion	50.00

Felonies

Final Disposition	Class B & C	Class A and Unclassified (Except Murder)	Murder in the 1st and 2nd Degrees
Trial	1,500	2,500	5,000
Change of plea after substantive motion work and hearing	1,000	1,500	2,500
Dismissal after substantive motion work and hearing	500	1,000	2,000
Change of plea post-indictment but prior to substantive motion work and hearing	500	1,000	2,000
Change of plea prior to indictment	300		
Dismissal without substantive motion	200		

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Appellate Rule 209(b)
concerning appointment of
counsel for indigents in
criminal appeals.

IT IS ORDERED:

Appellate Rule 209(b) is amended to provide:

(b) Criminal Matters.

(1) In criminal matters the trial court shall authorize appeals by appointed counsel in accordance with Criminal Rule 39 and Administrative Rule 12 [AT PUBLIC EXPENSE ON BEHALF OF PERSONS FINANCIALLY UNABLE TO PAY THE COSTS OF APPEAL IN ACCORDANCE WITH THE RULES AND DECISIONS OF THE APPELLATE COURTS OF ALASKA AND WHERE SUCH APPEALS ARE REQUIRED TO BE PROVIDED BY STATE COURTS BY DECISIONS OF THE SUPREME COURT OF THE UNITED STATES]. Where such appeals are authorized [BY THE TRIAL COURT] the costs which shall be borne at public expense [BY THE STATE SHALL] include those of providing counsel and of preparing a transcript and briefs. [CRIMINAL RULE 39 SHALL BE FOLLOWED IN MAKING THE DETERMINATION OF FINANCIAL INABILITY.]

(2) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to proceed at public expense on appeal.

(3) The action of the trial court in authorizing or declining to authorize an appeal at public expense is reviewable by a motion in the appellate court, ancillary to the appeal.

(4) Counsel appointed to represent the defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. In addition, an attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant on appeal. If an appeal is to be taken, in no event will trial counsel be permitted to withdraw until the notice of appeal and the documents required to be filed therewith by Rule 204(b) have been accepted for filing by the clerk of the trial courts [COMPELLING REASONS].

(5)* At the conclusion of the appellate proceeding, the Appellate clerk shall issue a judgment against a defendant represented by appointed counsel for the cost of representation on appeal. The cost of

* This paragraph would be deleted in the alternative version.

representation will be determined based on the following schedule:

<u>Type of Appellate Proceeding</u>	<u>Misdemeanor</u>	<u>Felony</u>
<u>Sentence Appeal</u>	<u>250</u>	<u>500</u>
<u>Merit Appeal</u>	<u>750</u>	<u>1,500</u>
<u>Combined Merit and Sentence Appeal</u>	<u>1,000</u>	<u>2,000</u>
<u>Other Appellate Actions</u> <u>(Petition for Review, Petition for Hearing, etc.)</u>	<u>500</u>	<u>1,000</u>

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore