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Besides the conceptual anomaly in the conflicting roles and loyalties of the two types of prosecutors, the practical consequences of a private advocate in today's prosecutorial role results in intolerable prejudices. Unlike their common law counterparts, modern prosecutors wield the power of the state's investigatory force, decide whom to indict and prosecute, negotiate the state's position in plea bargaining, and, because of their supposed impartiality as officers of the court, are influential in recommending punishment to the court.

In the normal private prosecutorial setting, the prosecutor remains in charge. Where the private advocate only observes the proceedings from indictment to completion of trial, arguably his presence exposes the defendant to minimal prejudice. However, since the private prosecutor's influence is not confined to the open courtroom, in which obvious prejudice could be more easily detected by the court, all stages of the judicial process must be considered in determining whether the mere presence of the private prosecutor is intollerably prejudicial. The following illustrations of the possible consequences of allowing a private prosecutor demonstrates the prejudice. Because of the varying degrees of control relinquished by the prosecutor, the following discussion by no means illustrates the actual situation in any given case, but it does indicate that the practice is fraught with possible prejudice.

One prosecutorial power that, if imprudently employed, could result in dire consequences to those suspected of a crime is the discretionary authority to decide when to prosecute. At this initial stage of the criminal proceeding, the private advocate is unlikely to play any normal role. However, though the public prosecutor decides whether to prosecute, possibly his decision may be influenced by the pressure of a privately retained attorney.

The solicitor's discretionary power to prosecute is restricted in federal criminal actions by the fifth amendment requirement that all prosecutions for infamous crimes be commenced by grand jury indictment. The function of the grand jury is to stand between the accusor and accused and determine whether a charge is well founded or, possibly whether it is a result of malice or ill will.[31] However, the fifth amendment requirement of grand jury indictment does not apply to states indictments, which may be served on the formal charge of the prosecu-

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prejudice, and animosities of this clients: to secure a conviction at all hazards. McKay v. State, 90 Neb. 63, 74, 132 N.W. 741, 745 (1911).

[31]Wood v. Georgia, 370 U.S. 375, 390 (1962).

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tor.[32] In this setting, a private prosecutor could, in those cases where the public prosecutor abdicated to the private attorney, use the discretion of his position at the whim of his client. Likewise, where the private prosecutor also represents a client in a civil suit arising from the same situation, the indictment power could be used as a lever to procure or enhance a financial settlement in the civil action. The reverse of this blackmail situation may be as damaging. For example, a private advocate retained by parties sympathetic to the defendant's plight could move for dismissal, fail to prosecute, or emasculate the indictment through plea bargaining.

Closely related to the power of the prosecutor to indict and prosecute is his discretionary use of the nolle prosequi.[33] Though officially in the province of the court, the employment of nolle prosequi and capias is normally left to the discretion of the solicitor.[34] Prejudices inherent in the exercise of such discretion when the possessor of it owes his loyalty to a private party seeking a conviction are repugnant to our system of justice and could lead to prolonged harassment.[35] The practice of plea bargaining is well established in the criminal process. Recently the United States Supreme Court indicated that plea bargaining is not inherently incompatible with a reasonable judicial standard and that the courts should not interfere unless there has been prosecutorial overreaching.[36] Because the allegiance owed by a private prosecutor to a possibly vengeful client must coexist with the impartiality demanded in the role of solicitor, a fair termination of any plea bargaining based on the equities of the situation is highly unlikely. The public solicitor who is in control of the plea bargaining is less likely to be fair if he is assisted and counseled by a private advocate. If the private prosecutor is given control of the plea bargaining, the interest of his client might override those of the public in determining whether a plea

[32]Hurtado v. California, 110 U.S. 516 (1884).

[33]A nolle prosequi is merely a declaration on the part of the solicitor that he will not prosecute the suit further at this time. It is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 159 N.C. 265, 74 S.E. 740 (1912). However, the defendant may be arrested and tried again. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915); State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256 (1852).

[34]State v. Moody, 9 N.C. 529 (1873); State v. Buchanan, 23 N.C. 59 (1840); State v. Thompson, 10 N.C. 613 (1825).

[35]Coupled with the prosecutor's discretionary power to prosecute, this device could be employed to blackmail an accused.

[36]Brady v. United States, 397 U.S. 742 (1970).

to a lesser crime[37] should be accepted.

With the development of the concept of the public prosecutor as an unbiased officer of the court has evolved the influence on the bench of the prosecutor's recommendations for punishment. A solicitor is under a duty to weigh all the mitigating and exculpatory circumstances in arriving at a fair recommendation. Such a duty would be meaningless if the private prosecutor, intent on conviction, possessed the responsibility.

Perhaps the most important power of the prosecutor is his discretion to choose what evidence is submitted to the court.[38] Through the evidence-collecting machinery available to prosecutors such as police investigatory agencies, the prosecutor uncovers both exculpating and inculpating evidence, which may not be discoverable by the defense despite an array of Supreme Court decisions that have proscribed the suppression of evidence which would exonerate the defendant.[39] Notwithstanding the court's admonishments, the prosecution still determines which evidence is exonerating and which is not. This discretion of the prosecution to determine initially what constitutes discoverable evidence should not be tainted with self-dealing.

Finally, at least some jurymen have confidence that the obligations imposed on the prosecutor will be faithfully observed. Consequently, improper suggestions and insinuations from the prosecutor are apt to carry much weight against the accused.[40] Notwithstanding the presence

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[37]The duty incumbent upon the office of prosecutor to ask for a verdict for a lesser offense when the facts and circumstances warrant presents a similar problem in the private prosecutorial setting. *See* State v. Josey, 112 S.C. 20, 99 S.E. 768 (1919). Again there is a discrepancy between the duty of a public prosecutor and that of a private advocate.

[38]At common law, the state was under little duty to disclose to the defense any information concerning the defendant's case. For a more complete description of the common law tradition, see People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[39]The common law approach to prosecution's immunity from defense discovery has been diluted somewhat by the application of the fourteenth amendment to certain prosecution tactics. The prosecution cannot intentionally use perjured testimony against the defendant at trial. Mooney v. Holohan, 294 U.S. 103, 111 (1935). *See also* Miller v. Pate, 386 U.S. 1, 7 (1967). The state is under a duty to correct perjured testimony when presented. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959). In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In addition, Court has strongly intimated that the prosecution is under a duty to initiate disclosure of evidence of the defense if the evidence will exonerate the defendant. Giles v. Maryland, 386 U.S. 66 (1967).

[40]Berger v. United States, 295 U.S. 78 (1935). There has also been concern about the appearance of a prejudiced solicitor before the grand jury. Nichols v. State, 17 Ga. App. 593, 87 S.E. 817 (1916).

of the private prosecutor, in most situations arising during the criminal proceeding the public solicitor or the court is in a position to avoid any resulting prejudice. This is not true, however, in the situation in which the private advocate examines a witness, addresses the jury, or argues to the bench. On such occasions, the harm is inflicted the instant an unwarranted implication or vituperation is released. Likewise, in some instances the mere presence of a private prosecutor is likely to bolster any inference of the guilt of the defendant in the minds of the jury, since the jury probably would ascribe more credence to a prosecuting witness who had invested heavily in the prosecution

III. Due Process Considerations

The fourteenth amendment due process clause is viewed as incorporating traditional notations of fundamental fairness implicit in the conce[illegible] of liberty;[41] it is a mandate to the states to afford the defendant the fundamental fairness essential to the concept of justice.[42] To determine if a defendant has been deprived of due process by a particular practice, the crucial question is whether the practice inherently is so prejudicial as to infringe the defendant's fundamental right to a fair trial.[43]

As applied to the private prosecution situation, the constitutional question depends on whether a procedure that demands impartiality on the part of the prosecutor becomes impermissably tainted when substantial private influence is interposed. The question is easily answered in the negative when the public prosecutor remains in complete control of the litigation and his decisions are unaffected by the presence of the private prosecutor. The answer should be different once the private prosecutor, who is paid to obtain a conviction, actually assumes any degree of influence, because his inherently biased suggestions and actions may compromise a crucial and effectively dispositive exercise of

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[38] Palko v. Connecticut, 302 U.S. 319 (1937).

[41] Lisenba v. California, 314 U.S. 219 (1941); Foster v. Illinois, 332 U.S. 134, 136 (1947). The emphasis is upon basic fairness, not upon compliance with the Bill of Rights, and a state procedure may be held to violate due process even though its operation is not contrary to any specific guarantees of the first eight amendments. Israel & LaFave, Criminal Procedure in a Nutshell 7 (1971). This "federalism" theory, though subordinated to the "selective incorporation" theory several years ago has recently resurfaced in the Supreme Court's opinions. Williams v. Florida, 399 U.S. 78, 117-43, (1970) (Harlan, J., concurring and dissenting).

[43] Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring, interpreting the majority opinion).

prosecutorial discretion.[41] Moreover, the difficulty in determining whether in specific cases the private prosecutor has actually prejudiced the defendant militates toward a ruling that private prosecutors should be banned in all cases, especially since the countervailing state interest in continuing the practice is miniscule. Arguably, any process which subjects the accused to the abuses inherent in the questioned method of trial deprives him of the fundamental fairness required by the due process clause.

IV. Ethical Considerations

Throughout the history of judicial review of private prosecution in North Carolina the ethical question of the propriety of private prosecution has been overlooked.[42] Though related to and often commingled with the conflict-in-roles consideraitons previously discussed, ethical decisions dealing with prosecutors have been less confined to the substantive structures of the past. The North Carolina State Bar has imposed a high moral obligation on the solicitor to seek justice at the expense of being denied convictions.[43] Moreover, both the Council of the North Carolina State Bar and the General Assembly have attempted to segregate the public solicitor from all private influences.[44] This philosophy has been followed to the extent of declaring it unethical for an attorney who shares office space or expenses with any judge, assistant judge, solicitor, assistant solicitor, or substitute solicitor to practice law in a criminal court of such officer[45] or for any attorney who is or has been such an officer to accept professional employment in any case growing out of any matter connected with his office during his incumbency.[46] These strict ethical standards result from the realization by the Council of the frailty of all men and of the adverse effect on public opinion of such associations regardless of whether actual prejudice in the courtroom results.[50] However, because of inconsistent opinions in

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[41] See text accompanying notes 4-9 *supra*.

[42] *See* cases cited note 2 *supra*.

[43] NCSB Canons of Ethics No. 5.

[44] NCSB Canons of Ethics Nos. 5, B, B-1, C. The need for citation to Ethics Opinions which restrict the solicitors private practice of law has been alleviated by the abolishment of such practice by statute. N.C. Gen. Stat. § 7A-61 (Supp. 1971).

[45] NCSB Canons of Ethics No. B-1; *see, e.g.*, NCSB Council, Ethics Opinions, No. 675 (1969); *id.* No. 623 (1968); *id.* No. 605 (1968); *id.* No. 588 (1967).

[46] NCSB Canons of Ethics No. C; *see, e.g.* NCSB Council, Ethics Opinions, No. 659 (1969); *id.* No. 665 (1969); *id.* No. 626 (1968); *id.* No. 555 (1967).

[50] Such a practice on the part of a court officer in accepting such employment would

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areas tantamount to private prosecution, such as [illegible] a city attorney criminally prosecutes a city employee, the Council's ethical stand on the issue is less than clear.[51] These inconsistencies are evidenced by the cumulative impact of the opinions which reveal that while the Council acknowledges that private prosecutors are proper it prohibits solicitors from accepting private fees.[52] It remains anomalous that the Council expects "clean hands" of the solicitor but accepts privately financed prosecution.[53]

V. Conclusion

Because of the inherent discrepancies in roles in both the philosophical and practical application, the possible ethical compromises, and the questionable constitutional legitimacy, the private prosecution should be abolished.[54] In the event a party can demonstrate that a particular prosecution is inadequate in a certain situation, the North Carolina General Statutes provide adequate means of alleviating the problem by the appointment of a temporary assistant to the public prosecution. This system avoids the prejudices resulting from private prosecution and results in the appointment of attorneys who prosecute in the state's interest and only for compensation by the state.

John A.J. Ward

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have the appearance of evil whether or not evil grows out of the practice and the solicitors . . . should not permit themselves to become next friends through the influence of attorneys practicing in their courts.

It is human frailty to return favors and consciously or unconsciously favors received often times influence one's conduct . . . .

NCSB Council, Ethics Opinions, No. 454 (1964).

[51] *See* NCSB Council, Ethics Opinions, No. 595 (1967); *id.* No. 284 (1959); *id.* No. 234 (1958); *id.* No. 142 (1954); *id.* No. 103 (1953).

[52] NCSB Council, Ethics Opinions, No. 470 (1965); *Id.* No. 250 (1958).

[53] Of notable significance is the fact that although the Council has issued in excess of 735 decisions, only seven have mentioned private prosecution. In addition, the Council has neither justified its confirmation of the practice nor addressed itself squarely to the issue.

[54] In *Best*, the North Carolina Supreme Court accurately pointed out that the legislature has provided for the appointment of a full-time solicitor to prosecute in the name of the state and to be compensated by the state, and for the appointment of temporary assistants when the dockets are crowded. However, the court concluded that since the statute did not specifically prohibit private prosecution, the practice was allowable. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972). However, it could be argued that since the statute established the office of public solicitor, restricted his compensation and loyalties, and provided for the appointment of assistants by a disinterested court in case of emergencies, the legislature intended to exclude the intrusion of private interests.

who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state . . . . 'The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success.' . . . [The prosecutor has a duty to present evidence favorable to the defendant]. This method of presenting a case is not that favored or pursued in civil cases, where the paid attorneys of the respective parties conduct them. And criminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt [sic] of the accused, are desirous of procuring his conviction."

In a later Wisconsin case, *State v. Peterson*, 195 Wis. 351, 218 N.W. 367, 369 (1928), the Court said:

"In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant."

This Court has recognized the inherent vice and potential prejudice arising from the participation of privately retained prosecutors in the prosecution of criminal defendants, but, nevertheless, has yet to strike down a conviction because of a private prosecutor's participation. The decisions have cast the burden on the defendant to allege and prove prejudice. We have come to believe that, by reason of the public policy enunciated by the Legislature, such a burden is unwarranted.

We are not unaware that in most jurisdictions private prosecutors continue to participate in public prosecutions and text authorities proclaim such practice to be the general rule. 63 Am.Jur.2d Prosecuting Attorneys § 9 (1972); 27 C.J.S. District & Prosecuting Attorneys § 23 (1959). The reasons advanced are many and diverse but the underlying assumption is that the prosecuting attorney will retain control and management of the case and presupposes the trial court will keep a watchful eye on the private prosecutor throughout the proceedings.

In "Private Prosecutions–The Entrenched Anomaly", 50 North Carolina Law Review 1171 (1972), the author discusses the conflicting roles of public and private prosecutors. Mention is made of the drastic change of the role of the public prosecutor since the inception of the doctrine permitting participation by private prosecutors. "From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done. The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain. It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence.

"Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly adverse to that of his client in the same general matter. Therefore, in view of the ethical and judicial restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, 'private prosecutor' is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate." 50 N.Car.L.Rev. at 1173 (footnotes omitted).

Our Court recognized this contradiction in *State v. Moreaux*, 254 Mo. 398, 409, 162 S.W. 158, 161 (1914), when the view was expressed that "they [special prosecutors] are usually employed by private individuals solely to secure a conviction, and their zeal and energies are bent to accomplish that end. This is not the sole purpose of a criminal prosecution, but a result which may, and if the accused is shown to be guilty should, follow a fair and impartial trial, always best afforded the accused when the prosecution is conducted by the state's accredited representative, who, no matter how vigorously he may prosecute, does not, or at least should not, under his oath, lose sight of the fact that the accused is entitled to a fair trial."

The distinction between the roles of a public prosecutor and a private prosecutor is recognized in Supreme Court Rule 4, Code of Professional Responsibility. Rule 4, EC 7-13 points out that the responsibility of a public prosecutor differs from that of the usual advocate, noting that it is the public prosecutor's duty to seek justice, not merely to convict. Reasons are spelled out why the public prosecutor has this special duty. Rule 4, DR 7-103(B) further amplifies the duty and obligations of the public prosecutor in criminal litigation. On the other hand, Rule 4, EC 5-1, EC 5-14, EC 5-21, and EC 7-1, concerning the duties his cause, free from the interests or desires of others.

The modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable.

The judgment is reversed and the cause remanded.

SEILER, C. J., and MORGAN, BARDGETT, FINCH and DONNELLY, JJ., concur.

HOLMAN, J., dissents in separate dissenting opinion filed.

HENLEY, J., dissents and concurs in separate dissenting opinion of HOLMAN, J.

HOLMAN, Judge (dissenting).

I respectfully dissent. My dissent is based on the point which rules that privately employed attorneys may no longer assist prosecuting attorneys in this state.

In the first place this ruling is contrary to the general rule in this nation. In 27 C.J.S. District & Pros. Attys. § 25a, p. 711, it is said that, ". . . special prosecutors, privately employed, are permissible if agreeable to the prosecuting attorney; and provided the district or prosecuting attorney retains control and management of a criminal prosecution, . . ." and at § 29(1)(c), p. 725, it is stated that, "By the great weight of authority the court may, in its discretion, permit the prosecuting attorney to have the assistance of counsel employed by the prosecuting witness or other [illegible] interested in securing a conviction; but no appointment, it has been held, can be made only on the request or consent of the prosecuting attorney, which however,

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Likewise, in this state the practice has long been approved. In the early case of *State v. Hamilton*, 55 Mo. 520, 521 (1874) this court stated that, "There is no law in this State to prevent the employment of counsel to assist the Circuit Attorney in carrying on a prosecution. It is very often necessary to promote the ends of justice that it should be done. When counsel are engaged and take part in the conduct of a case, the peculiar position or attitude that they shall assume in reference thereto, is primarily a matter to be arranged between themselves, under the supervision and control of the trial court. It was within the discretion of the court to permit the assistant counsel to conclude the argument in the case, if the prosecuting officer waived his right to do so, and we will not attempt to revise that discretion here. . . ." Also, in *State v. Finley*, 245 Mo. 465, 150 S.W. 1051, 1054 (1912) the court stated that, "Error is also assigned in the trial court's action in permitting special counsel to conduct the examination of witnesses for the state. This assignment must also be disregarded. *State v. Stark*, 72 Mo. 37; *State v. Coleman*, 199 Mo. 120, 97 S.W. 574. The information must be preferred by the prosecuting attorney; but after that is done we see no reason why a special counsel may not conduct the trial in the same manner as the public prosecutor. He is under the eye of the court, and must conform to all the rules of the court and laws which regulate the conduct of the prosecuting attorney." And in the more recent case of *State v. Matthews*, 111 S.W.2d 62, 65 (Mo.1937) Judge Westhues stated that, "If parties interested in a prosecution feel that the prosecuting attorney, elected by the people, is unable to cope with the legal talent employed by the defendant, they ought in justice be permitted to employ additional counsel at their own expense. Lawyers, after all, are sworn officers of the court and while conducting a trial are under the direct control of the trial court. How, then, can the employment of counsel in a criminal prosecution be legally [illegible]

reason for departing from our previous rulings."

Other cases of like import are: *State v. Stark*, 72 Mo. 37[1] (1880), *State v. Robb*, 90 Mo. 30, 2 S.W. 1[3] (1886), *State v. Orrick*, 106 Mo. 111, 17 S.W. 176[8] (1891), *State v. Taylor*, 98 Mo. 240, 11 S.W. 570[1] (1889), *State v. Coleman*, 199 Mo. 112, 97 S.W. 574[9] (1906), *State v. Barnes*, 325 Mo. 545, 29 S.W.2d 156[9] (1930), *State v. Boyer*, 232 Mo. 267, 134 S.W. 542[6] (1911) and *State v. McCracken*, 341 Mo. 697, 108 S.W.2d 372[2] (1937). While the principal opinion does not mention that any cases are being overruled thereby it seems clear that the decision overrules all of the cases (and no doubt others) that have been heretofore cited.

Great reliance seems to be placed on S.C. Rule 4-E.C. 7-13 which specifies the duties of a prosecuting attorney and his responsibilities to the defendant as well as to the public. I do not think that rule should affect this decision. When a lawyer is employed to assist the state he is probably bound by that rule. If not, it is clear that the prosecuting attorney is in absolute charge of the case and he will see to it that the rule will not be violated in connection with the prosecution of the case. The private attorney does not become the prosecuting attorney but is merely employed to assist him.

Of course, no one wants to see an innocent man convicted of a crime. By the same token good citizens do not desire to see a guilty man acquitted. Conviction of the guilty is necessary if we are to have any substantial enforcement of laws. Many courthouses have the motto inscribed thereon that, "Obedience of law is liberty." The defendant is entitled to a fair and just trial. The state and the public are also entitled to fair and just treatment. The defendant has always been awarded many advantages in the trial of a criminal case and recent decisions have added to them. Some of these advantages are: (1) the state must prove its

defendant is presumed to be innocent, (3) the defendant is entitled to twice as many peremptory jury challenges as the state in felony cases, (4) the defendant may refuse to testify and the state cannot comment thereon, (5) if he does testify his cross-examination is restricted, (6) there are restrictions upon the use of confessions and line-ups, (7) the verdict must be unanimous as distinguished from three-fourths in civil cases, and (8) prior to trial the prosecutor must disclose all of his information to the defendant which might aid him. And the decision today will add one more restriction upon the prosecution.

Many prosecuting attorneys are very able. In many areas, however, young attorneys are elected to that office just to enable them to obtain experience. It is not unusual to elect a man prosecuting attorney who has never actually tried a case. And yet he will often have to match his ability with highly skilled criminal lawyers. Under the principal opinion when that situation develops a private attorney could not be employed to assist the prosecution.

The practice of employing private counsel is rarely used in this state. I see no necessity for this court, however, to decree that the practice is absolutely outlawed. There are no doubt a few cases from time to time where assistance is necessary and desirable. This practice which has been approved in this state for more than a century should not be disturbed.

Ex parte William Clyde HOUSTON, Jr., Petitioner,

v.

Wm. J. HENNESSEY, Jr., Respondent.

No. 36657.

Missouri Court of Appeals, St. Louis District, Division Two.

Nov. 10, 1975.

Habeas corpus proceeding was brought by petitioner who had been found guilty of criminal contempt for violating temporary injunction. The Court of Appeals, Stewart, J., held that where petitioner's answer to verified return to writ was not under oath of petitioner, allegations of return must be taken as true; that court did not improperly deny petitioner's request to disqualify judge; and that since petitioner who knew of temporary injunction allowed approximately 50 days to elapse without his attacking it before he knowingly displayed film which was substantially the same as the film which was the subject of the temporary injunction, petitioner was properly found guilty of criminal contempt.

Writ of habeas corpus quashed and petitioner remanded to custody.

1. Habeas Corpus ⇐83

Where court issued writ of habeas corpus and respondent made verified return to writ in which he alleged that he held petitioner pursuant to commitment order which followed judgment and order entered by the court and petitioner's answer to return was not made under oath of petitioner as required by rule, the allegations of return must be taken as true. V.A.M.R. Civil Rule 91.28.

2. Contempt ⇐33

Constitutional courts of common-law jurisdiction have inherent power to punish for contempt.

[illegible] district attorney (St. [illegible] 59.47, 340.37, and § 59.44, subds. 1-3).

Where attorney, paid from private source, sat at district attorney's table while jury was being drawn, and assisted outside courtroom in preparation of state's case in prosecution for embezzlement, defendant was entitled to new trial, for though district attorney may incidentally receive advice or help from outside parties, it is against public policy for attorney employed by private individual to assist him, except as provided in St. 1925, §§ 59.40, 59.47, 340.37, and section 59.44, subds. 1-3.

2. District and prosecuting attorneys ⇐8—District attorney must interview all whom he has reason to believe know any fact material to criminal prosecution.

It is duty of district attorney to interview all whom he has reason to believe may know any fact material to criminal prosecution, whether person interviewed be attorney retained by those interested in prosecution or other witnesses.

3. District and prosecuting attorneys ⇐8—Every citizen has duty to inform district attorney of facts known with reference to law violation.

Citizens have duty to inform district attorney of facts known to them with reference to any violation of law, whether they are laymen or members of bar representing those interested in prosecution.

4. District and prosecuting attorneys ⇐1—District attorney, investigating alleged offense, acts in quasi judicial capacity.

District attorney, in making investigation of any alleged offense, must of necessity consult those who know facts, and in such cases he acts in quasi judicial capacity, and determines what course should be pursued, in view of facts disclosed.

5. Embezzlement ⇐9—Proof of village treasurer's embezzlement of funds collected for payment to school district treasurer shows embezzlement of village funds (St. 1927, § 343.20).

Showing that village treasurer embezzled funds collected, which were ultimately to reach school district treasurer, shows embezzlement of funds belonging to village, since it is considered that funds belonged to village treasurer within meaning of St. 1927, § 343.20, until village treasurer performed duty and paid funds to school district treasurer.

6. Embezzlement ⇐11(2)—In prosecution of village treasurer for embezzlement of funds collected for payment to school district treasurer, defendant may show that funds were so paid, or disbursed for benefit of district.

In prosecution of village treasurer for embezzlement of funds collected for payment to school district treasurer, defendant *held* entitled [illegible] district treasurer [illegible] able to produce receipt from school district treasurer or show payment directly to him, where sums were actually devoted to use of school district by payment to bank in discharge of obligations of school district.

8. Embezzlement ⇐9—Village treasurer cannot be convicted of embezzlement for misappropriation of funds collected by him after they had reached school district treasury.

Village treasurer cannot be convicted of embezzlement of funds collected for payment to school district treasurer by proof that, after moneys had reached school district treasury, they were thereafter misappropriated.

Error to the Circuit Court for Crawford County; S. E. Smalley, Circuit Judge.

Clarence Peterson was convicted of embezzlement, and moved for a new trial. The court granted the motion, and the State brings error. Affirmed.—[By Editorial Staff.]

The defendant was convicted of embezzlement, and moved for a new trial on several grounds, among which was that the evidence was not sufficient to sustain a conviction, and that the trial court erred in permitting private counsel to appear in the preparation and prosecution of the case. The court granted the motion for a new trial on the latter ground, and the state sued out a writ of error to test the correctness of the ruling.

John W. Reynolds, Atty. Gen., J. E. Messerschmidt, Asst. Atty. Gen., and J. S. Hartl, of Prairie du Chien, for the State.

Kopp & Brunckhorst, of Platteville, J. P. Evans, of Prairie du Chien, and Alvin B. Peterson, of Soldiers Grove, for defendant in error.

VINJE, C. J. (1) The state does not challenge the fact that it is the established rule in this state that the participation in the trial of a criminal case in court by an attorney paid by private parties is error sufficient to vitiate the conviction. But it is claimed by the state that the assistance given in the trial of this case was not such as to come within the established rule; that at most all that Mr. Grubb, the private attorney, did, was to sit at the district attorney's table while the jury was being drawn, and that afterwards he refrained from coming into the courtroom, though he remained in Prairie du Chien, oc-

cupied the office of the district attorney, and assisted in questioning prospective witnesses for the state. The trial court, in announcing his decision, stated at least some of the things that Mr. Grubb did in the preparation and assistance in the trial of the case. If we eliminate from the case that part that Mr. Grubb did in the trial thereof in the courtroom, we are faced with the question as to whether private parties can pay an attorney for preparing for the trial of a criminal case, such preparation consisting in occupying the office of the district attorney, in summoning prospective witnesses to the office, and in questioning them and making memoranda of what they can testify to, and in transferring those memoranda to the district attorney for use on the trial, and in consulting with the district attorney as to the prosecution. The fact that the district attorney may incidentally receive advice or help from outside parties, including private attorneys, does not render a criminal prosecution void. The gist of the error lies in the fact the private parties are permitted to pay private attorneys for the prosecution of criminals, which prosecution consists, not only in appearing in court, producing witnesses, questioning them as well as those adduced by the defendant, and arguing the case to the jury, but includes also a preparation for trial, finding out what witnesses can testify to, and producing such testimony in court.

It is clear that the statute contemplates such preparation for trial, for subdivision 2 of section 59.44 provides that, when a judge appoints counsel to assist the district attorney in the trial of a case, it may allow $25 per day for each day actually occupied in the trial, but not to exceed $15 per day, and for not more than five days actually and necessarily occupied in preparing for trial. Thus it seems quite clear that, if it is against public policy to pay from private sources for work done in the actual trial or in the open courtroom, it is equally against public policy to permit private parties to pay for necessary work in preparing for trial. It is true that in cases hereinafter cited the work had all been done in the courtroom. But it seems to us that more harm may be done to the defendant by preparation outside the courtroom and privately paid for than by assistance given in open court. In this case it is not very easy to determine the full extent and scope of the assistance given by Mr. Grubb to the district attorney in the work which he performed in his office. If the work is performed in open court, it is obviously easily ascertainable by both parties, as well as subject to the control of the judge during the trial. Here Mr. Grubb was subject to no one in the work which he did in preparation for trial, and no opportunity was given to the trial court or to this court to determine the exact scope and character of the work Mr. Grubb did. Therefore, when it appears that some substantial work is done by an attorney paid by private parties in the preparation of a trial, and that the result of his labors is given to the district attorney for such use as he may make of it, we think it comes equally within the ban of the rule prohibiting the payment by private parties for work done in assisting the district attorney in the courtroom. Of course, to come within such prohibition all aid, whether given in the courtroom or outside, must be aid which is paid for by private parties, and not by the state or district attorney.

Section 59.17 makes it the duty of the district attorney to prosecute or defend "all actions, * * * civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county." Section 59.44 provides:

"When there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is sick or is to the party to be tried on a criminal charge, or is unable to attend to his duties, the circuit court, by an order entered in the minutes stating the cause therefor, may appoint some suitable person to perform, for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting." Subdivision 1.

Subdivision 2 of the same section provides that the court "may, in the same manner, and in its discretion, appoint counsel to assist the district attorney, in the prosecution of persons charged with crime punishable by imprisonment in the state prison, and in cases of prosecutions before a grand jury, and upon indictments found by grand juries, and in bastardy cases. Such counsel shall be paid such sums as the court, by order entered in the minutes, certifies to be a reasonable compensation therefor, which sum shall in no case exceed $25 per day for each day actually occupied in such prosecution, and not to exceed $15 per day for not more than five days actually and necessarily occupied in preparing for trial in any one case, the same to be paid in the manner provided by law for the payment of counsel for indigent criminals." And subdivision 3 of the same section reads:

"When there is an unusual amount of civil litigation to which the county is a party or in which it is interested, the circuit court may, on the application of the county board, by order filed with the clerk of said county, appoint an attorney [illegible] assist the district attorney [illegible]"

Section 30.40 provides for assistance for the district attorney in other than special counties, and section 340.57 provides the district attorney shall not office with other attorneys than partners.

It will be seen from these statutory provisions that the legislative scheme was and is that the district attorney shall prosecute all criminal actions in the courts of his county, and that, where he is not able to do so for any reason, the court shall appoint some suitable person in his place to prosecute. It will also be observed from the statutory scheme that it provides for every contingency that one can think of wherein the district attorney needs aid, and where it may properly be given him and in what manner it may be given. In the prosecution of criminal actions, the district attorney prosecutes for public wrongs, not for private wrongs, and such prosecution should be by a public officer, and not a private party. This court has from its earliest days given full effect to our statutory scheme, and has declared it to be the public policy of the state.

In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.

In Diemel v. State, 71 Wis. 450, 37 N. W. 244, this subject is treated at length, and the court there says:

"We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that no attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases. The laws have clearly provided that the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial."

Cases from other states and from England are there cited to sustain the policy declared. That policy has been reaffirmed in State v. Russell, 83 Wis. 330, 53 N. W. 441; Smith v. State, 146 Wis. 111, 130 N. W. 804, 33 L. R. A. (N. S.) 403, and in Income Tax Cases, 148 Wis. 456, 134 N. W. 673; 135 N. W. 164. In Rock v. Ekern, 162 Wis. 201, 154 N. W. 197, L. R. A. 1916D, 450, it was held that a contract which provided for the payment by Mr. Ekern to Mr. Rock in assisting in the prosecution of one Fowler was void upon the ground of public policy. Mr. Rock had rendered services in the preliminary examination of Mr. Fowler which this court held to be a part of the services contracted for, but that he could not recover because the contract between the two was against public policy. The court says:

"The contract as proved is against the public policy of this state and the trial court erred in permitting the plaintiff to recover thereon. The acquiescence of the accused, the court, and the district attorney to allow plaintiff to assist in the prosecution of Fowler under his private employment by defendant does not purge the contract of employment of its illegal character and affords no excuse to enforce it."

It is not quite clear how much Mr. Grubb of Janesville participated in the preparation or trial of the case, as most of his work was done outside of the courtroom. The trial court in his opinion granting a new trial stated:

"At the opening of the trial, Mr. Grubb, an attorney residing at Janesville, appeared in court and sat at the table with Mr. Earll, who was district attorney pro tempore, appointed by the court to prosecute the case, and remained at the table during the impaneling of the jury. Before any further proceedings were had, counsel for defendant state[d] to the court, in substance, that they would object to Mr. Grubb appearing in the case or participating in the trial, as he was in the employ of private persons interested in prosecuting the defendant. No record was made of this, but the court stated that it would not be proper for Mr. Grubb to participate in the trial, and he thereupon withdrew, and did not again appear in court during the trial. Upon the argument of the motion for a new trial, it was made to appear by affidavit that Mr. Grubb remained in Prairie du Chien, where the trial was held, during the entire time the trial was in progress, which lasted nearly two weeks, made use of Mr. Earll's office, and that he so remained in Prairie du Chien for the purpose of aiding and assisting Mr. Earll in securing evidence to be presented, examining witnesses prior to their testifying in court, etc. Mr. Earll in reply stated that Mr. Grubb was given the right to use his office; that he used it largely for conferences with his own clients, but that he did question some of the witnesses for the state prior to their testifying [illegible]

Mr. Earll as to what their testimony would be. It is further alleged in affidavits upon information and belief that a fund of about $3,000 was raised by private parties for the purpose of investigating and prosecuting the defendant, which allegations are not denied. So it must be taken as a fact that Mr. Grubb rendered some assistance, and did to some extent partake, in the trial and prosecution of the defendant both inside the courtroom and outside.

"The conclusion reached is that material aid given to the district attorney in the preparation for trial or in the trial of a criminal case, by a private attorney who is paid for such aid by private parties, invalidates the conviction. This conclusion does not mean that a district attorney may not consult with parties interested in the prosecution of criminal cases, nor with attorneys who are under pay investigating the facts involved in the criminal prosecution. But it does mean that attorneys cannot be employed by private parties for the purpose of prosecuting criminal cases whether the services are rendered in the courtroom in the trial of the case or in the office preparing the case for trial."

[2, 3] This conclusion does not prevent the district attorney from fully investigating every alleged offense against the public. It is his duty to interview all who he has reason to believe may know any fact material to any criminal prosecution, whether the person interviewed be an attorney retained by those interested in the prosecution or any other witnesses. This conclusion does not absolve any citizen from the duty of informing the district attorney of the facts known to him with reference to any violation of the law, whether such citizen is a layman or a member of the bar representing those interested in the prosecution.

[4] In his investigation of any alleged offense, the district attorney must of necessity consult those who know the facts—the parties who have been wronged and their attorneys, if they have employed them. In all such cases the district attorney acts in a quasi judicial capacity, and determines what course should be pursued, in view of the facts disclosed by his investigation. It is only when the prosecuting officer shares his quasi judicial functions and permits the attorney employed and paid by private parties to participate in determining what shall be done with reference to the commencement of a criminal prosecution, or with reference to the manner in which the prosecution shall be conducted, that the case comes within the condemnation of the rule which is here applied.

[5, 6] On behalf of the defendant, it is urged that the order granting a new trial in this case should be affirmed, on the ground that the defendant was prosecuted under an allegation in the information alleging that he had embezzled funds belonging to the village of Soldiers Grove, and that he was found guilty of embezzling funds belonging to the school district. Although the funds collected by the village treasurer were by law ultimately to reach the hands of the school district treasurer, it is considered that they belonged to the village treasurer, within the meaning of section 348.20, until the defendant, as village treasurer, had performed his duty and paid the funds to the school district treasurer. However, in view of the method in which the business of the village and school district was conducted, the defendant was entitled to show in any way that he could that he had in fact discharged his duty as village treasurer, and that all of the funds which should have gone to the treasurer of the school district had in fact passed to the treasurer of the district, or been disbursed for the benefit of the district.

[7, 8] In view of the circumstances of this case and the method in which the business was transacted, the defendant should be credited with such sums as were actually devoted to the use of the school district whether paid direct to the school district treasurer or paid to the bank in discharge of other obligations of the school district. It is, as we understand the facts in the case, would require a full accounting between the defendant and the school district. If the moneys belonging to the school district were actually devoted to its lawful uses and purposes, the defendant cannot be held liable as for a conversion merely because under the circumstances of this case he was unable to produce a receipt from the school district treasurer, or show payment directly to the treasurer of the school district. A conviction under the information could not be sustained by proof that, after the moneys had reached the school district treasury, they were thereafter misappropriated.

Leave to amend the information, if deemed necessary upon a new trial, is granted.

Order affirmed.

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : February 23, 1987

FROM: Karla L. Forsythe KLF
Staff Counsel

SUBJECT: House Bill 121: Repeal of AS 12.45.150, relating to payment of costs by private prosecutor.

In September I sent you a memorandum outlining concerns expressed to me by Robin Turnbull, clerk of the Kenai court. She told me that several times within that month private citizens had appeared in the clerk's office and wanted to file private person criminal complaints, citing AS 12.45.150 as authority. Ms. Turnbull asked about processing procedures, since the statute and court rules are silent. Just this past week, Judge Jones called me from Kotzebue with similar questions.

Although attempts by private parties to file complaints are relatively infrequent, they do occur several times each year, and when they do courts are perplexed about the proper procedure to follow. The Department of Law has always taken the position that the statute does not authorize private persons to file criminal complaints. Accordingly, I recommended to you that the court system approach the Department of Law about introducing legislation to repeal the statute.

You wrote to Attorney General Brown in September asking if the department would be willing to introduce such legislation, and indicating that the court system would be glad to testify in support.

It appears that this law has been on the books since 1900. Under AS 44.23.020(b)(3), the attorney general is authorized to prosecute all cases involving violations of state law. The Department of Law believes the purpose of AS 12.45.150 is not to authorize private prosecutions, but to give the court the ability to impose costs immediately in the event of malicious accusations. The Department of Law favors repeal because the statute is poorly drafted, because it probably violates a citizen's constitutional rights by allowing immediate imposition of costs without a hearing, and because it appears to authorize private criminal prosecutions.

In summary, this is a small but vexing concern that arises at least several times each year, and repeal of the statute would clear up the confusion.

KLF:bs

2/24/87-3

Sec. 44.23.010. Attorney general. The principal executive officer of the Department of Law is the attorney general. (§ 9 ch 64 SLA 1959)

Collateral references. — 7 Am. Jur. 2d, Attorney General, § 1 et seq.; 72 Am. Jur. 2d, States, Territories and Dependencies, § 62.

7A C.J.S. Attorney General, § 1 et seq.; 81A C.J.S. States, § 61.

Section Repealed Conflicts With This

Sec. 44.23.020. Duties. (a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(1) bring, prosecute and defend all necessary and proper actions in the name of the state for the collection of revenue;

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(4) administer state legal services (including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs), and give legal advice on a law, proposed law or proposed legislative measure upon request by the legislature or a member of the legislature;

(5) draft legal instruments for the state;

(6) make a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office, and

(B) on needed legislation or amendments to existing law; and

(7) perform all other duties required by law or which usually pertain to the office of attorney general in a state;

(8) prepare, publish and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication. (§ 9-1-5 ACLA 1949; am § 1 ch 128 SLA 1959; § 9 ch 64 SLA 1959; am § 1 ch 8 SLA 1976)

NOTES TO DECISIONS

Powers and duties are those ascribed at common law. — This section indicates that the office of the attorney general is to function with those powers and duties normally ascribed to it at common law. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Under the common law, an attorney general is empowered to bring any

Sec. 12.45.130. Acknowledgment of satisfaction by injured party. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that satisfaction has been received for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime. (§ 6.14 ch 34 SLA 1962)

NOTES TO DECISIONS

The crime of leaving the scene of an accident is not amenable to civil compromise. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

Sec. 12.45.140. Compromise or stay upon compromise by other means prohibited. A crime may not be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law. (§ 6.15 ch 34 SLA 1962)

NOTES TO DECISIONS

The crime of leaving the scene of an accident is not amenable to civil compromise. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

Repealed

Sec. 12.45.150. Order for private prosecutor to pay costs for malicious prosecution without probable cause. The name of a person who voluntarily appears before a judge, magistrate or grand jury to prosecute a person in a criminal action, either for a misdemeanor or felony, shall be endorsed upon the complaint, information, or indictment as a private prosecutor. If it is found by a judge, magistrate or court trying the action or hearing the proceeding that the prosecution is malicious or without probable cause, those facts shall be entered upon the record in the action or proceeding by the judge, magistrate or court. Upon making the entry, the judge, magistrate or court shall immediately render judgment against the private prosecutor for the costs and disbursements of the action or proceeding, which may be enforced by execution in the same manner as a judgment in a civil action. (§ 6.16 ch 34 SLA 1962; am § 16 ch 8 SLA 1971)

Sent to all members

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 9, 1987

The Honorable John Sund
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 121

Dear Representative Sund:

I was pleased to see that HB 121 (repealing AS 12.45.150) passed the House yesterday. I am concerned, however, about some apparent misconceptions which may have arisen during debate on the bill. As stated in the bill's transmittal letter, it is our position that there is no such thing as a "private prosecutor" in the State of Alaska. Because it is poorly drafted and confusing on this point, AS 12.45.150 should be repealed. Repeal of this statute would not remove or reduce any powers which citizens now have, it would merely eliminate a source of confusion.

More importantly, I was surprised to hear that some legislators apparently believe that permitting private persons to prosecute criminal actions would be good social policy and in the public interest. In my view, the power to criminally prosecute, to cause someone to be charged, arrested, and brought to trial, is one that should not be influenced by personal disputes and private animosities. Instead, that power ought to be exercised by an objective prosecutor, who is bound by the canons of professional ethics and the rules of court.

AS 12.45.150 is a misleading statute which has, until now, primarily been used for filing private criminal charges against police and prosecutors in Kenai. If HB 121 is not passed (thereby strengthening the perception that any private citizen is free to file criminal charges as he or she sees fit), I predict that the statute will be used with increasing frequency against all types of government officials--state, federal, and local--who incur the displeasure of private individuals. "Private" prosecutions would also tend to clog the criminal courts with things such as private boundary disputes (criminal trespass), breaches of contract (criminal fraud), and could conceivably give persons legal remedies that were never intended under Alaska's landlord-tenant laws.

Criminal actions could also be filed against legislators and judicial officers under broadly-worded criminal statutes such as AS 11.56.850 (official misconduct) or AS 39.50.090 (conflict of interest). Although the concept of legislative and judicial immunity may ultimately be a shield against conviction, it will not protect against unfair charges, and the attendant publicity cannot help but decrease public confidence in our government.

I urge you and your colleagues to again pass HB 121 on reconsideration so that the Senate can expeditiously consider this legislation.

Very truly yours,

for Grace Berg Schaible
Attorney General

GBS:DJG:so-15

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

REQUEST

Bill/Resolution No.: Law Log 773-87-0067
Title: An Act repealing a provision related to payment of costs by private prosecutor
Sponsor: Rules
Requestor: Governor
Date of Request:

FISCAL DETAIL

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
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						
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

The Alaska Court System concurs with this legislation.

Prepared by: Karla Forsythe — Phone: 264-8228
Division: General Counsel, Alaska Court System — Date: 1-5-87

Approved by Commissioner: Arthur H. Snowden, II — Date: 1-5-87
Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

REQUEST

Bill/Resolution No. :
Title : "An Act repealing a provision related to payment of costs by private prosecutors."
Sponsor : House Rules/By req. of the Gov.
Requestor : Office of the Governor/OMB
Date of Request : December 29, 1986

FISCAL DETAIL

Agency Affected : Department of Law
BRU : Prosecution
Components : All

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
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						

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

Please see the attached analysis.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director — Phone : 465-3672
Division : Administrative Services — Date : 12/30/86
Richard I. Pegues/for/Ronald W. Lorensen,
Approved by Commissioner : Acting Attorney General — Date : 12/30/86
Agency : Department of Law

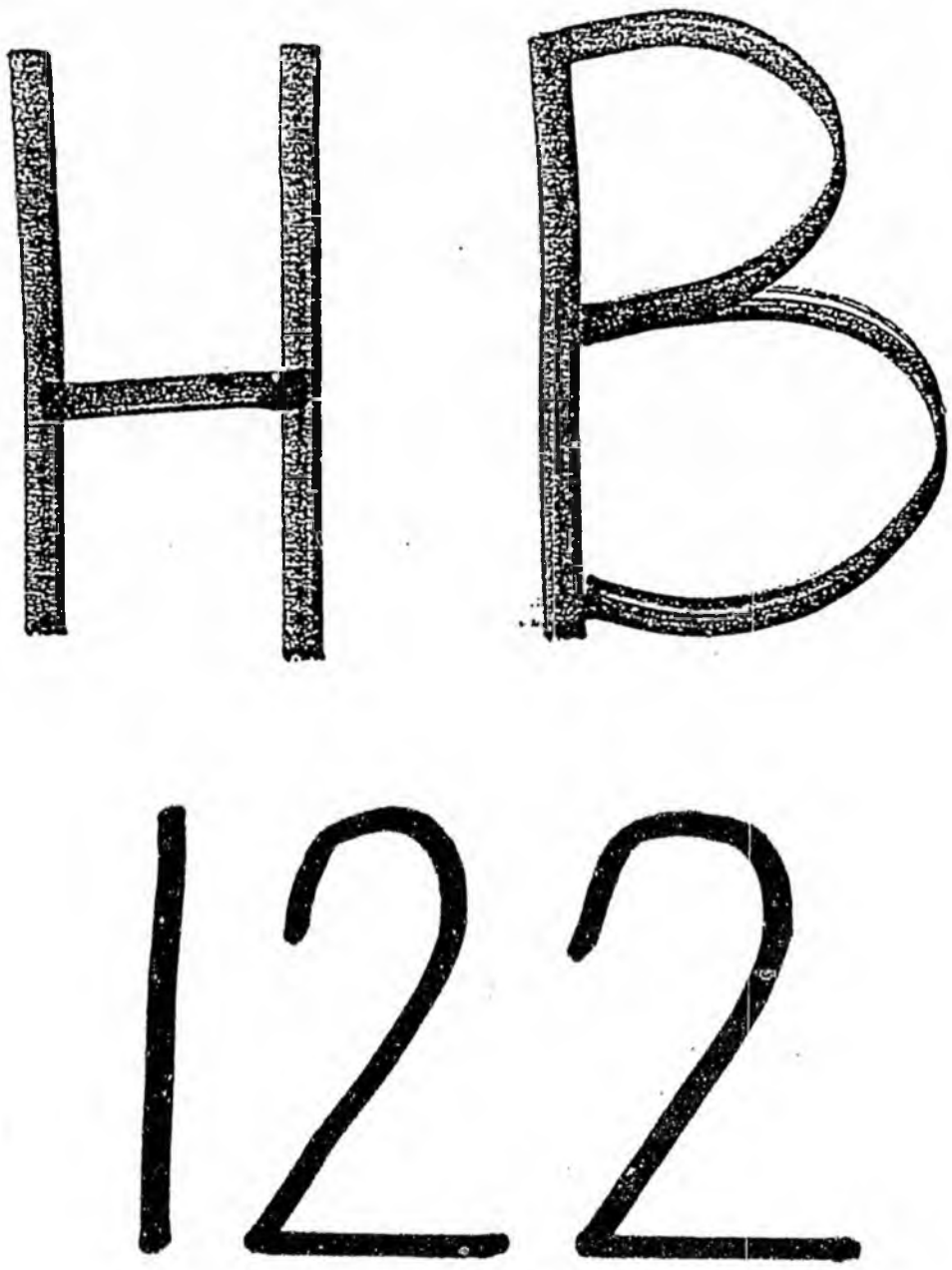
Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

9/16/86

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____ HB 121

This bill repeals AS 12.45.150, which provides that malicious accusations, or those lacking probably cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." This statute, drafted in 1900, has also created confusion in lay persons as to their independent authority to file private criminal actions. This authority simply does not exist in Alaska. Both the Department of Law and the Alaska Court System are recommending repeal of the statute due to the confusion and the cost involved when lay persons attempt to bring complaints as "private prosecutors."



STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would prohibit the "civil compromise" of criminal cases arising from domestic violence situations. This proposed legislation was requested by the Council on Domestic Violence and Sexual Assault and is supported by the Alaska Network on Domestic Violence and Sexual Assault.

Under existing law (AS 12.45.120 -- 12.45.140), a misdemeanor crime for which the injured party has a civil remedy may, except under certain circumstances, be ordered dismissed by the court if the defendant and the victim reach a civil compromise (in other words, if the defendant pays the victim money in recompense). This bill amends AS 12.45.120 to add crimes that arise from a domestic violence situation to the list of crimes that may not be civilly compromised.

Alaska's civil compromise statute, originally adopted in 1900, is modelled upon an 1813 New York statute. The statute apparently was based on the belief that there are some minor cases (such as libel, trespass, or simple assault) that, while technically public offenses, are, in reality, primarily private disputes between two parties. In such cases, it was believed, the public interest would be better served if the parties could reach an amicable resolution of their private dispute outside of the courtroom. Although such provisions were widespread at the turn of the century, many states, including New York, have since repealed their civil compromise statutes. There are only about 15 states, including Alaska, which now retain some form of civil compromise statute.

Unfortunately, in recent years the civil compromise statute has been used by abusive spouses as an easy and cheap way of obtaining the dismissal of criminal charges pending against them. In the recent case of State v. Nelles, 713 P.2d 806 (Alaska App. 1986), the Alaska Court of Appeals upheld a Fairbanks judge's decision to dismiss criminal charges against a man who had struck his girlfriend in the face

with his fist, injuring her and requiring stitches. Nonetheless, the court expressed concern "that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur." 713 P.2d at 810. The court was unwilling to judicially create an additional exception to the civil compromise statute, however. The court stated:

> The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.

713 P.2d at 810; footnote omitted.

In recent years, there has been an increasing awareness in our society of the pervasive problem of domestic violence: the physical and sexual abuse of women, children, and the elderly. In 1980, the Alaska legislature adopted a tough new domestic violence law that allows the victim of domestic violence to go to court to obtain a restraining order for protection against an abusive spouse or family member (AS 25.35.010 -- 25.35.060). Under certain circumstances, violation of such a court order is a crime (see, e.g., AS 11.61.120(a)(6)). Because of the need to protect victims from domestic abuse, the legislature amended the state's criminal procedure code in 1978 to allow a peace officer to arrest an offender for certain types of domestic crimes, even if the crime was a misdemeanor not committed in the officer's presence. This is an exception to the general rule. See AS 12.25.030(b).

Battered wives, young children, and elderly parents are often in an extremely precarious position. The victim may be dependant upon the offender for food, shelter, and emotional support, and may therefore be particularly vulnerable to threats or coercion. In recent years, state prosecutors have handled several homicide and felony assault cases where the victims had been repeatedly beaten by their husbands or boyfriends. In some of these cases, criminal charges had been filed, only to be later dismissed at the victim's request. It makes little sense to toughen the state's civil and criminal laws against domestic violence on one hand but, on the other hand, to continue to allow abusers to pressure their victims into "civilly compromising" the charges against them.

This bill recognizes that we have an obligation to protect those who are too young, too old, or too emotionally vulnerable to be able to effectively protect themselves. The abuse of women, children, and the elderly is an offense against every member of a civilized society; it is emphatically not a "private dispute" for which a civil compromise is appropriate. I urge your prompt and favorable action on this bill.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-3-87	1:30 p.m.
H. JUD.	2-27-87	1:30 p.m.
H. JUD.	2-18-87	1:30 p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: [illegible]/11/87 FURTHER REFERRALS: Finance

DATE: ____________________

The Judiciary Committee has considered HB 122

"An Act relating to the authority to compromise certain misdemeanors."

RECOMMENDS:

[✓] replace with (S HB 122 (Judiciary))

[ ] attached amendment(s)

[ ] the same title

[ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ____________________ Committee

ADOPTS: [ ] __________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ____________________

[ ] same as previous zero fiscal note published ______________

SIGNING DO PASS:

[signature]

[signature]

SIGNING OTHER RECOMMENDATIONS:

[signature] no rec

Mike [illegible] no rec

[signature] no rec

Robin L. Taylor (DON'T PASS)

Max F. Gruenberg Jr

Do not pass unless amended to allow compromise in certain cases - particularly certain divorce cases as per Judiciary Committee Gruenberg amendment #3

[signature]

Chairman's signature

REVISED

adopted

A M E N D M E N T #1

Offered in the House

To: HB 122

By Gruenberg &

Taylor

Page 1, line 19

Delete "(4) larcenously;" and insert "[(4) LARCENOUSLY]"

Renumber following section accordingly.

Comment: In appropriate cases, the court should have the authority to allow civil compromises of petty larcenies, including, for example, shopliftings. Larcenies under $500 and theft of credit cards are misdemeanors and could be civilly compromised if the amendment is adopted.

REVISED

Defeated

A M E N D M E N T #2

Offered in the House

By Gruenberg

Taylor

TO: HB 122

Page 1, line 20, following "(5)":

Insert "in a case involving a misdemeanor charge under AS 11.41, criminal trespass (AS 11.46.320 -.330), harassment (AS 11.61.120), or a similar municipal ordinances which was committed"

Crimes against people

Reason: Assault cases.

Ulmer:

→ Custodial interference.

→ malicious destruction of property

→

REVISED

Defeated

A M E N D M E N T #3

Offered in the House By Gruenberg

TO: HB 122

Page 1, line 11, following "Action."

Insert "(a)"

Page 1, after line 28 insert:

"Section 2. AS 12.45.120 is amended by adding a new subsection to read:

(b) Not withstanding AS 24.45.120(a)(5) the court may accept a civil compromise to a crime otherwise compromisable, if the court makes findings based on clear and convincing evidence that:

(1) the victim and defendant are engaged in a ~~pre-existing open~~ divorce case in which both are represented by independent counsel, and both counsel have jointly petitioned the court to accept the compromise,

(2) both parties are aware of the consequences of the prosecution of the criminal charge, and the consequences of a dismissal,

(3) there is no duress or coercion of the victim, and;

(4) there is no need to protect the victim or the public by prosecuting the criminal charge."

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
REQUEST: Publish Date: 02/11/87

Revision Date:
Agency Affected: Administration
Title: "An Act relating to the authority to compromise misdemeanors..."
BRU: Office of Public Advocacy
Sponsor: Rules Committee
Components:
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 2/22/87

Approved by Commissioner: For: Garrey Peska
Date: 2/26/87
Agency: Department of Administration

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

MEMORANDUM

4/14/87

TO: Rep. John Sund

FROM: J. Hartle, PA

RE: HB 122 Civil compromise

******* Max says that the floor battle will be over adopting the Judiciary Committee CS - he will move it ********* After that is decided, Max will have amendments re divorce.

HB 122 (Rules/Governor) An Act relating to the authority to compromise certain misdemeanors

Status: House Floor

Judiciary heard HB 122 2/18, 2/26, 3/3

Testified: Barbara Mikilos, Council on Domestic Violence and Sexual Assault
Margot Dick, Shelters Network
Gayle Horetski, Law - Prosecution

Judiciary passed out CS

Judiciary CS: Deleted "larcenously" as type of crime that cannot be civilly compromised - allowing compromise for larceny.

Issue: Gruenberg wants to add exceptions to the exception i.e. situations where civil compromise can occur between family members who are in divorce proceedings. (See newspaper from Ulmer re murders in families who are in divorce proceedings).

Finance Committee (by one vote) adopted original bill (rejecting Judiciary CS)

Testimony for the bill:

The only thing batterers seem to consistently respond to is getting into serious trouble with the law. This seems to be the only approach that really gives them the message that society does not approve of their actions. Too frequently, the victim will drop the charges, civilly compromise the case

and start the cycle of behavior again.

Testimony against the bill:

Takes away an ability of people to settle their own disputes voluntarily.

Testimony for removing "larcenously:"

Gives a person who has been robbed a tool for getting his or her money back e.g. "make me whole and I will compromise out of court." Otherwise it doesn't do the thief any good to make the victim whole.

Testimony against removing "larcenously:"

Allows a criminal to maintain a pattern of behavior, i.e. stealing and compromising, without involving law enforcement. A conviction for larceny is usable in court against an accused criminal.

ALASKA WOMEN'S LOBBY
POST OFFICE BOX 10-1571, ANCHORAGE, ALASKA 99510

February 18, 1987

Honorable John Sund, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Chairman Sund and members of the committee:

The Alaska Women's Lobby would like to express our continuing support for legislation which would prohibit the civil compromise of criminal cases which arise from domestic assault.

It has been policy in many areas of the state to take domestic assault cases to court even if the victim changes her/his mind but the statutes must back up this policy.

Professionals believe that nearly all such victims are physically or emotionally co-erced into dropping the charges.

Civil compromise is not appropriate in domestic violence cases as it is very important to get the offender into treatment in order to avoid subsequent offenses.

HB 122 recognizes that society must sometimes intervene to protect vulnerable persons who may be unable to protect themselves.

We are whole-heartedly supportive of this important legislation and would urge it's speedy passage.

Thank you for your consideration.

Sincerely,

Sherrie Markin Goll

Sherrie Markin Goll
Alaska Women's Lobby

from Rep Gruenberg

STATE OF ALASKA

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-7541

March 17, 1987

Mark Hendley
Aide to Representative Gruenberg
P.O. Box V
Juneau, Alaska 99811

Dear Mark:

Thank you for requesting my input on Representative Gruenberg's amendment to HB 122 regarding civil compromise of misdemeanors.

It is my understanding that Representative Gruenberg's amendment would allow theft and concealment of merchandise cases to be civilly compromised if they are misdemeanors. There are a number of theft offenses which would be particularly amenable to civil compromise. For example, theft of services, AS 11.46.200 includes absconding without paying for hotel or restaurant services. If a defendant in one of these cases were to pay the hotel or restaurant for the services rendered and were perhaps to provide additional compensation for the time and effort spent in processing the charges, the criminal justice system would be relieved of this class of cases.

Another classification of theft cases which might be amenable to compromise are those involving theft of lost or mislaid property, AS 11.46.160. In these cases, a person is charged with theft if he finds mislaid property and keeps that property rather than attempting to restore it to the owner. In a case of this sort, if the property were eventually returned to the owner and other compensation or services rendered by the defendant to the owner's satisfaction, the criminal justice system could be relieved of processing this type of case.

A third classification of theft cases which might appropriately allow civil compromise are those involving theft of merchandise from a store. Again, if a defendant were to return the merchandise and perhaps volunteer to do yard work or janitorial work for the owner of the store, this type of case might appropriately be removed from the criminal justice system.

It is my understanding that the state's position is to continue to obtain formal theft convictions in order to assure that a prior record is available for impeachment purposes should trials on other criminal offenses arise in the future. However, some theft cases are resolved prior to police involvement or charges being filed if the victim is able to obtain the return of his property before the police are called. In those cases, the state never has involvement and no prior conviction

exists. Representative Gruenberg's proposed amendment will simply allow the same type of resolution short of criminal justice proceedings at a later stage of the case.

In a time of declining oil revenues, it will be important to focus judicial, prosecution and public defense resources on those offenses which truly require formal prosecution, conviction and incarceration. The civil compromise statute will apply only to misdemeanor offenses involving less than $500 of property or services. If the victim is satisfied with the return of property or payment for lost time or services, it may make sense for the criminal justice system to focus on other cases where the victim wishes to proceed with prosecution.

I appreciate your request for my input on this matter. Feel free to contact me if you have any questions on this bill or any others.

Very truly yours,

Dana Fabe

Dana Fabe
Public Defender

DF:sh

HB122

and James filed for divorce on June 29, 1983. The divorce was not granted until May 29, 1984. Given these circumstances, the court did not abuse its discretion in relying on the date of permanent separation in its division of property and award of interest.

The superior court's division of property is REVERSED and the case REMANDED for further proceedings consistent with this opinion.[4]

STATE of Alaska, Appellant,

v.

Bruce NELLES, Appellee.

No. A-955.

Court of Appeals of Alaska.

Feb. 7, 1986.

State brought action for misdemeanor assault. The Fourth Judicial District Court, Fairbanks, H.E. Crutchfield, J., dismissed the charge pursuant to misdemeanor civil compromise statute and State appealed. The Court of Appeals, Bryner, C.J., held that: (1) the civil compromise statute did not violate doctrine of separation of powers, and (2) dismissal of case upon civil compromise did not imply that case was prosecuted solely to obtain advantage in civil matter.

Affirmed.

1. Constitutional Law ⇐61, 74
Criminal Law ⇐12

Civil compromise statute [AS 12.45.120–12.45.140] does not violate separation of powers doctrine because court's authority to compromise misdemeanors has been expressly conferred by legislature and prosecutorial consent to civil compromise is not necessary as matter of constitutional law.

2. Constitutional Law ⇐70.1(10)

Amendment to civil assault statute [AS 12.45.120–12.45.140] to create exception for crimes arising from domestic disputes is clearly matter of legislative, rather than judicial, concern.

3. Criminal Law ⇐40

Civil compromise statute [AS 12.45.120–12.45.140] does not conflict with Code of Prof.Resp., DR 7-105(A), prohibiting a lawyer from presenting criminal charges solely to obtain advantage in civil matter, because dismissal of case upon civil compromise does not imply that case was prosecuted "solely to obtain an advantage in civil matter."

Jeffery O'Bryant, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Harold M. Brown, Atty. Gen., Juneau, for appellant.

Raymond Funk, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

The state appeals from a district court dismissal of a misdemeanor assault charge against Bruce Nelles. Judge H.E. Crutchfield dismissed the charge pursuant to the misdemeanor civil compromise statute. We affirm.

BACKGROUND

While intoxicated, Nelles struck his girlfriend, Mary M. Henry, on the mouth with his fist. Henry's injury required four

4. Because we remand for further proceedings, we need not consider James' contention that the court abused its discretion in awarding attorney's fees to Deborah.

stitches. She filed a citizen arrest form seeking Nelles' arrest.

At a bail hearing before Judge Crutchfield, Nelles' attorney moved for dismissal. He submitted a statement titled "Compromise of Criminal Action," which was signed by Henry and stated:

> Comes now the injured party in the above-entitled action, Mary Henry, and hereby acknowledges that he/she has received satisfaction for the injury to his/her person and further states that he/she does not wish to proceed with this action, since he/she has received satisfaction for injury to his/her person from the Defendant, Bruce Nelles.

The state opposed Nelles' motion for dismissal. The court allowed Nelles' counsel to examine Henry under oath. Henry testified that she and Nelles intended to marry, that he had never assaulted her on any other occasion during their one year together, that none of her clothes had been torn, that she had not incurred any medical expenses, that she was unemployed at the time of the assault, had lost no wages, and that she did not want any civil compensation from Nelles.

Judge Crutchfield further questioned Henry:

> *Court:* (to witness) I don't know whether Mr. Wildridge, in taking this written statement from you, explained the provisions of Title 12.45.120–130, which I'm obviously looking at. And, I think the basis for this is to not prosecute some cases but by the same time the legislature recognizes that the court system and the police, and the prosecutor should not be some type of a buffer zone and have their time taken up with boy-girl relations, okay?
>
> *Henry:* I understand.
>
> *Court:* And, there's some provisions for costs and I've never been clear about who the costs should be assessed against, whether it's the defendant or the witness who brings the charges, and, then—you are aware, of course, that there's a possibility that if I grant it, that I may, based upon the court's time and everybody's time, I may have to assess some costs—before it would be dismissed? Did you understand that?
>
> *Henry:* (inaudible)
>
> *Court:* Okay.
>
> . . . . .
>
> *Court:* You're not frightened of Mr. Nelles I take it then, you, he didn't try to talk you into doing this or threatening you in any way?
>
> *Henry:* No.

Judge Crutchfield initially denied Nelles' motion to dismiss. After Nelles moved for reconsideration, however, Judge Crutchfield ordered the case dismissed "pursuant to the civil compromise provisions" and "upon payment of $100 costs." The state has appealed the order of dismissal.

DISCUSSION

"In theory there should be no compromises of criminal cases." Miller, *The Compromise of Criminal Cases*, 1 So.Cal.L. Rev. 1 (1927). And in practice, "the civil and criminal law operate independently of one another so that resolution of a victim's civil rights and remedies has no effect upon criminal prosecution." *People v. Moulton*, 131 Cal.App.3d Supp. 10, 182 Cal.Rptr. 761, 766 (1982). "An exception to this principle exists, however, where a statute specifically authorizes a compromise of the criminal, as well as the civil, liability arising out of certain conduct." Annot., 42 A.L.R.3d 315, 318, § 2[a]. Many states, including Alaska, have adopted such statutes, allowing judicially-sanctioned compromises and dismissals of criminal charges.[1]

It appears that Alaska's civil compromise statutes derived from the same source as

1. AS 12.45.120–.140; Ariz.Rev.Stat.Ann. § 13-3981 (1978); Cal.Penal Code § 1377-79 (West 1982); Idaho Code Ann. § 19-3401-3403 (1979); Mass.Gen.Laws Ann. ch. 276, § 55 (West 1972); Nev.Rev.Stat. § 178.564–568 (1983); Okla.Stat. Ann. tit. 22, § 1291-94 (West 1958); Or.Rev.Stat. § 135.703-709 (1983); Pa.Stat.Ann. tit. 19, 26 (Purdon 1964); Utah Code Ann. §§ 77-50-1 to -3 (1978).

most other similar statutes, a 181[illegible] York statute that read:

> That in all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of surety, be committed, or shall be indicted for an assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done riotously or with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by civil action, if the party complaining shall appear before the magistrate who may have taken the recognisance, or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate in his discretion to discharge the recognisance, &c. or for the court also in their discretion, to order a *nolle prosequi* to be entered on the indictment.[2]

1 N.Y.R.L. § 19 (1813), *quoted in People v. Moulton*, 131 Cal.App.3d Supp. 10, 182 Cal. Rptr. 761, 765 (1982). The purpose of the statute was to encourage the amicable resolution of disputes that were primarily private in nature:

> The policy underlying compromise statutes was explained by the New York Commissioners on Practice and Pleading in 1849 as follows:
>
> > There are many cases, which are technically public offenses, but which are in reality rather of a private than a public nature, and where the public interests are better promoted by checking than by encouraging criminal prosecutions. Of this class are libels, and simple assaults and batteries; or those which according to [the civil compromise statute], are not committed by or upon an officer of justice, while in the execution of the duties of his office, or riotously, or with an intent to commit a felony. With these exceptions, cases of this nature have by the policy of our statutes, always been considered fit subjects of compromise ...; a policy which has been carried by the courts, still further than the terms of the statute.

People v. Moulton, 182 Cal.Rptr. at 765 (citations omitted).

Alaska's civil compromise statutes are contained in AS 12.45.120–12.45.140, which state:

> *Sec. 12.45.120. Authority to compromise misdemeanors for which victim has civil action.* When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed
>
> (1) by or upon a peace officer, judge or magistrate while in the execution of the duties of that office;
>
> (2) riotously;
>
> (3) with an intent to commit a felony;
>
> (4) larcenously.

2. In large part, the laws of Alaska are derived from those of Oregon. F. Brown, *The Sources of the Alaska and Oregon Codes*, Part I, 2 U.C.L.A.-Alaska L.Rev. 15, 16 (1972). The Alaska civil compromise statutes appear to first have been adopted in 1900 and to have been derived from the Oregon Civil Compromise Statutes. *See* Ann.Alaska Codes, Pt. II, ch. 28, §§ 253–256 (Carter 1900) (the Alaska statute refers to the Oregon law, presumably as its source). *See infra*, n.3. The Alaska statutes also had virtually identical wording to the Oregon statutes. *Compare* Ann.Alaska Codes, Pt. II, ch. 28, §§ 253–256 (Carter 1900) *with* Gen.Laws of Or., Code of Crim.Proc., ch. XXX, §§ 315–318 (Deady 1845–1864); renumbered, Or.Laws, tit. I, ch. XXX, §§ 1519–1522 (Hill 1892); renumbered, Or.Laws, tit. XVIII, ch. XV, §§ 1696–1699 (Lord 1910).

The laws of Oregon, and therefore Alaska, are derived in large part from those of New York. Although, "[t]he major borrowing took place in Oregon in 1853–1854 ... Oregon's celebrated Judge Matthew P. Deady and others reworked the Oregon law in 1862–1864, using as their major sources the 1854 codes and the draft codes prepared for New York by a commission by David Dudley Field. The Field Commission had also relied heavily on the older New York statutes ..." F. Brown, *The Sources of the Alaska and Oregon Codes*, Part II, 2 U.C.L.A.–Alaska L.Rev. 37 (1973).

Sec. 12.45.130. Acknowledgment of satisfaction by injured party. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that satisfaction has been received for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime.

Sec. 12.45.140. Compromise or stay upon compromise by other means prohibited. A crime may not be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law.[3]

In this case, the state initially contends that these statutes violate the separation of powers doctrine. The state relies upon *State v. Carlson*, 555 P.2d 269, 271–72 (Alaska 1976), and *Public Defender Agency v. Superior Court*, 534 P.2d 947, 951–52 (Alaska 1975). It argues that the district court's order of dismissal amounts to "a usurpation of the executive power residing in the state district attorney's office to bring charges and determine their disposition." We find this argument to be without merit.

In *State v. Carlson*, the defendant was indicted for murder, but the trial court, against the state's opposition, agreed to accept a guilty plea to the lesser offense of mansiaughter. No statute or rule permitted the trial court to accept such a plea. The supreme court reversed, finding that the trial court's decision would "usurp the executive function of choosing which charge to initiate...." 555 P.2d at 272. In *Public Defender Agency v. Superior Court*, the trial court ordered the state to prosecute a civil action for child support. The supreme court similarly concluded that the separation of powers doctrine had been violated, holding that "the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding." 534 P.2d at 950.

[1] In the present case, there was no judicial interference with the prosecution's

3. The statutes, as originally adopted in 1900, read:

Sec. 253. *What crimes may be compromised.* That when a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in the next section, except when it was committed—

First. By or upon an officer of justice while in the execution of the duties of his office;

Second. Riotously; or

Third. With an intent to commit a felony; or

Fourth. Larcenously.

Laws Oreg., Oct. 19, 1864; Hill's Ann.Laws, s. 1519.

Sec. 254. *Compromise by permission of the court; order thereon.* That if the party injured appear before the court at which the defendant is bound to appear, at any time before trial on an indictment for the crime, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but the order and the reasons therefor must be entered on the journal.

Laws Oreg., Oct. 19, 1864; Hill's Ann.Laws, s. 1520; *Saxon v. Hill*, 6 Oreg., 383.

Sec. 255. *Order a bar to another prosecution.* That the order authorized by the last section, when made and entered, is a bar to another prosecution for the same crime.

Laws Oreg., Oct. 19, 1864; Hill's Ann.Laws, s. 1521.

Sec. 256. *No crime can be compromised, except.* That no crime can be compromised, nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter.

Laws Oreg., Oct. 19, 1864; Hill's Ann.Laws, s. 1522.

The statutes appear unchanged from the original version in Comp.L.Ann., tit. XV, ch. 28, §§ 2362–2365 (1913); Comp.L.Ann., §§ 5431–5434 (1933), and Comp.L.Ann., tit. 66, ch. 18, §§ 66–18–1 to 66–18–4 (1948). In 1962, a number of minor amendments were made to the language of the statutes. *See* SLA, ch. 34, § 6.13 (1962). Additionally, the first exception in Sec. 253 was expanded from the original "an officer of justice" to "a peace officer or magistrate," in 1962, SLA, ch. 34, § 6.13 (1962), and expanded to "a peace officer, judge or magistrate," in 1971. SLA, ch. 8, § 15 (1971). Also, Sec. 255 was consolidated with Sec. 254 in 1962. SLA, ch. 34, § 6.13 (1962).

initial decision to charge Nelles. Judge Crutchfield did subsequently exercise his discretion to dismiss the case. Yet this dismissal was expressly authorized by the legislature. AS 12.45.120, 12.45.130. There is no suggestion in the civil compromise statutes that the court's power to dismiss is conditioned upon the agreement of the prosecutor. In fact, the contrary appears to be the case. *See* Annot., 42 A.L.R.3d 315, 319 (a common condition precedent under compromise statutes is the consent of either the court *or* the prosecutor). *See also Hoines v. Barney's Club, Inc.*, 28 Cal.3d 603, 170 Cal.Rptr. 42, 47, 620 P.2d 628, 633 (1980) (in explaining the civil compromise statute, the court stated that the prosecutor has no role in a dismissal of civil compromise). The state has cited no case purporting to hold that prosecutorial consent to a civil compromise is necessary as a matter of constitutional law, and we are aware of none. Because the court's authority to compromise misdemeanors has been expressly conferred by the legislature, we find the present case readily distinguishable from *State v. Carlson* and *Public Defender Agency v. Superior Court*, and we conclude that there is no separation of powers violation made out here.

[2] The state's next argument is that crimes arising from domestic disputes should not be amenable to civil compromise. Certainly, the state has a valid concern: that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur. However, the state cites no support for the argument that public policy mandates a judicially created exception to the civil compromise statute. The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.[4]

Moreover, we note that, under the Alaska civil compromise statute, the decision whether to dismiss or prosecute is vested in the sound discretion of the trial court, and no right to dismissal is conferred upon the accused. In cases of domestic violence that appear to involve a continuing danger of injury to the victim, it could well be an abuse of discretion for the trial court to order dismissal. In the present case, however, the state has not suggested any ongoing danger to the victim, and the record contains nothing to indicate that Judge Crutchfield abused his discretion in this regard.

[3] The state further argues that the civil compromise statute engenders conflict with the Alaska Code of Professional Responsibility, Disciplinary Rule 7-105(A), which states that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." *See, e.g., MacDonald v. Musick*, 425 F.2d 373 (9th Cir.1970) (prosecutorial misconduct where charge of resisting arrest was introduced as "bludgeon" behind the attempt to defeat a possible civil action by the arrestee for false arrest). This rule is plainly inapplicable here. Dismissal of a case upon civil compromise simply does not imply that the case was prosecuted "solely to obtain an advantage in a civil matter."[5]

Judge Crutchfield's dismissal of the case is AFFIRMED.

4. We note that California has amended the civil compromise statute to create an exception barring civil compromise when the injury arises from a second willful and knowing violation of a restraining order imposed to prevent domestic violence. Cal.Penal Code § 1377 (West 1982) (statute amended 1979). It should also be noted that any willful infliction of physical injury resulting in a "traumatic" condition upon a cohabitant of the opposite sex is a felony under California law. Cal.Penal Code § 273.5 (West 1970) (adopted 1977).

5. The state has also argued that Alaska's civil compromise statute is unconstitutionally vague. We find this argument to be frivolous.

HB122

> Compensation Act, evidenced its intent to exclude defective, dangerous machinery from the coverage of the Compensation Act . . . ."

425 P.2d at 605. Similarly, AS 23.40.040 was comprehensive when it was enacted, but it was further defined by PERA.

[11] All statutes relating to the same subject matter should be read together as a whole in order that a total scheme evolves which maintains the integrity of each act and avoids ignoring one or the other. *Fuentes v. Workers' Compensation Appeals Board*, 16 Cal.3d 1, 128 Cal.Rptr. 673, 547 P.2d 449, 453 (1976); *State v. Wright, supra.* With this goal in mind, PERA and AS 23.40.040 can be effectively harmonized to further the legislative purpose of establishing uniform procedures for public employee collective bargaining and to protect the policies the legislature thought important in enacting PERA.

The judgment is REVERSED and REMANDED with instructions to enter summary judgment in favor of appellant.

Thomas P. HENSEL, Appellant,

v.

STATE of Alaska, Appellee.

No. 3719.

Supreme Court of Alaska.

Nov. 3, 1978.

Proceeding was instituted on petition by State to review an order of the district court granting motion of motorist to dismiss traffic complaint pursuant to civil compromise statutes. The Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., determined that offense with which motorist was charged was not amenable to civil compromise and remanded case for further prosecution. Motorist plead nolo contendere to charge and specifically preserved issue of civil compromise for appeal. The Supreme Court held that act constituting crime of leaving scene of an accident is failure to stop and make necessary exchanges of information or assistance after accident has occurred and is not one which causes injury to private citizens within meaning of civil compromise statutes and, hence, is not amenable to civil compromise.

Conviction affirmed.

1. Automobiles ⇐336
   Criminal Law ⇐40

Act constituting crime of leaving scene of an accident is failure to stop and make necessary exchanges of information or assistance after accident has occurred and is not one which causes injury to private citizens within meaning of civil compromise statutes and, hence, is not amenable to civil compromise. AS 12.45.120, 12.45.130, 12.45.140, 28.35.060.

2. Criminal Law ⇐40

Settlement of claim for injuries resulting from an accident cannot settle a claim by State for violation of its laws such as a traffic complaint for leaving scene of accident. AS 12.45.120, 12.45.130, 12.45.140, 28.35.060.

Max F. Gruenberg, Jr., Anchorage, for appellant.

Mary Anne Henry, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR and MATTHEWS, Justices.

OPINION

PER CURIAM.

This case concerns the Alaska civil compromise statutes: AS 12.45.120, 12.45.130 and 12.45.140.[1]

On September 22, 1976, Hensel struck a vehicle driven by Dan B. Chatfield on the Old Wasilla Highway and then left the scene. Hensel was charged with leaving the scene of an accident in violation of AS 28.35.060.[2] An affidavit in proof of satisfaction and civil compromise was signed by Chatfield and filed in district court. It stated that, as a result of the accident, Chatfield's vehicle was damaged in the amount of $365.00 and that Hensel had paid that amount of money to Chatfield.

On December 13, 1976, Hensel filed a motion to dismiss the complaint pursuant to AS 12.45.120 and 12.45.130, the civil compromise statutes. A hearing was held before the district court, which granted Hensel's motion to dismiss. The state petitioned the superior court for review. On April 11, 1977, the superior court concluded that the charge of leaving the scene of an accident was not amenable to civil compromise. The case was remanded for further prosecution. Hensel pled *nolo contendere* to the charge, specifically preserving the issue of the civil compromise for appeal.[3]

We have not previously had an opportunity to interpret the civil compromise statutes.

[1, 2] We agree with the superior court's conclusion that the crime of leaving the scene of an accident is not amenable to civil compromise. This conclusion is supported by cases interpreting similar statutes. *State v. Duffy*, 33 Or.App. 301, 576 P.2d 797, 798 (1978); *People v. O'Rear*, 220 Cal. App.2d Supp. 927, 34 Cal.Rptr. 61, 63-64 (Cal.App.1963).[4] The act constituting the

1. AS 12.45.120 provides:

Authority to compromise misdemeanors for which victim has civil action. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

(1) by or upon a peace officer, judge or magistrate while in the execution of the duties of his office;

(2) riotously;

(3) with an intent to commit a felony;

(4) larcenously.

AS 12.45.130 provides:

Acknowledgment of satisfaction by injured partly. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that he has received satisfaction for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime.

AS 12.45.140 provides:

Compromise or stay upon compromise by other means prohibited. No crime may be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law.

2. AS 28.35.060 provides in part:

Duty of operator to give information and render assistance.

(a) The operator of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle which is driven or attended by a person shall give his name, address, and vehicle license number to the person struck or injured, or the operator or occupant, or the person attending, and the vehicle collided with and shall render to any person injured reasonable assistance, including making of arrangements for attendance upon the person by a physician and transportation, in a manner which will not cause further injury, to a hospital for medical treatment if it is apparent that treatment is desirable. Under no circumstances is the giving of assistance or other compliance with the provisions of this paragraph evidence of the liability of an operator for the accident.

(b) Except as provided in (c) of this section, a person who fails to comply with any of the requirements of this section is, upon conviction, punishable by imprisonment for not more than one year, or by a fine of not more than $500, or by both. This provision does not apply to a person incapacitated by the accident to the extent he is physically incapable of complying with the requirement.

3. *See Oveson v. Municipality of Anchorage*, 574 P.2d 801, 803 n.4 (Alaska 1978); *Cooksey v. State*, 524 P.2d 1251, 1254-57 (Alaska 1974).

4. *See also, State ex rel. Williams v. City Court of City of Tucson*, 18 Ariz.App. 394, 502 P.2d 543, 545 (1972); *State ex rel. Schafer v. Fenton*, 104 Ariz. 160, 449 P.2d 939, 941 (1969).

crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance [5] after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws.

The conviction is AFFIRMED.

5. This case does not involve a claim based on a failure to render assistance. We do not reach the issue of whether such a claim is subject to civil compromise.

HOUSE

COMMITTEE REPORT

Date referred: 1/13/86

FURTHER REFERRALS: FINANCE

DATE: ____________

The JUDICIARY Committee has considered HB 463

"An Act relating to criminal trials and restitution."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[ ] replace with CSHB 463 (JUD) [ ] same title

[ ] new title

and recommends ____________

[ ] further referral to the ____________ Committee

and attaches:
[ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

[signature]

[signature]

SIGNING OTHER RECOMMENDATIONS:

[signature] no rec

[signature] No rec

Robin L. Taylor Do NOT PASS

[signature] no rec

[signature] No R.

[signature]

Chairman

Ford
3/11/86

Gruenberg

Original sponsors: Thompson, Jenkins,
Uehling, et al

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 463 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the authority to compromise certain misdemeanors and to the payment of fines and restitution."

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

* Section 1. AS 12.45.120 is amended to read:

Sec. 12.45.120. AUTHORITY TO COMPROMISE MISDEMEANORS FOR WHICH VICTIM HAS CIVIL ACTION. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

(1) by or upon a peace officer, judge, or magistrate while in the execution of the duties of that office;

(2) riotously;

(3) with an intent to commit a felony;

(4) by assault against

(A) the spouse of the defendant, unless the court finds that a divorce is pending between the individuals and a restraining order against further assaultive behavior has been issued;

(B) a former spouse of the defendant;

(C) a parent, grandparent, child, or grandchild of the defendant;

(D) a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(E) a person who is not a spouse or former spouse of the defendant but who previously lived in a spousal relationship with the defendant [LARCENOUSLY].

* Sec. 2. AS 12.55.045(a) is amended to read:

(a) The court may order a defendant convicted of an offense to make restitution as provided in this section, including restitution to a public or private nonprofit organization that has provided counseling, medical, or shelter services to the victim or as otherwise authorized by law. Before an order of restitution is entered, upon request, the defendant may have an opportunity to establish by a preponderance of the evidence the inability to pay restitution during the term of the sentence. [IN DETERMINING THE AMOUNT AND METHOD OF PAYMENT OF RESTITUTION, THE COURT SHALL TAKE INTO ACCOUNT THE FINANCIAL RESOURCES OF THE DEFENDANT AND THE NATURE OF THE BURDEN ITS PAYMENT WILL IMPOSE.]

* Sec. 3. AS 12.55.051(a) is amended to read:

(a) If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why the defendant should not be sentenced to imprisonment for nonpayment. If the defendant fails to establish [COURT FINDS] by a preponderance of the evidence that the defendant did not intentionally refuse or fail [DEFAULT WAS ATTRIBUTABLE TO AN INTENTIONAL REFUSAL OR FAILURE] to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied. A term of imprisonment imposed under this section may not exceed one day for each $50 of the unpaid portion of the fine or restitution or one year, whichever is shorter. Credit shall be given toward satisfaction of the order of the court for every day a person is incarcerated for nonpayment of a

fine or restitution.

Ford
3/11/86

Gruenberg

Original sponsors: Thompson, Jenkins,
Uehling, et al

IN THE HOUSE BY THE JUDICIARY COMMITTE

CS FOR HOUSE BILL NO. 463 (Judiciary)

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(B) a former spouse of the defendant;

(C) a parent, grandparent, child, or grandchild of the defendant;

(D) a member of the social unit comprised of those living together in the same dwelling as the defendant; or

need some definitions

medical → ~~adj per~~ as provided by a licensed medical provider (what ever the term of art is)

counseling → some guideline of "licensed counselor."

shelter services → "room and board"

(E) a person who is not a spouse or former spouse the defendant but who previously lived in a spousal relationsh with the defendant [LARCENOUSLY].

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fine or restitution.

Civil compromise statute

Introduced: 1/13/86
Referred: Judiciary and Finance

IN THE HOUSE BY THOMPSON

HOUSE BILL NO. 463

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to criminal trials and restitution."

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

* Section 1. AS 12.45.120 is amended to read:

Sec. 12.45.120. AUTHORITY TO COMPROMISE MISDEMEANORS FOR WHICH VICTIM HAS CIVIL ACTION. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

(1) by or upon a peace officer, judge, or magistrate while in the execution of the duties of that office;

(2) riotously,

(3) with an intent to commit a felony;

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(A) a spouse or a former spouse of the defendant;

(B) a parent, grandparent, child, or grandchild of the defendant;

(C) a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(D) a person who is not a spouse or former spouse of the defendant but who previously lived in a spousal relationship with the defendant.

degree of kinship

* Sec. 2. AS 12.55.045(a) is amended to read:

(a) The court may order a defendant convicted of an offense to

make restitution as provided in this section, including restitution to a public or private nonprofit organization that has provided counseling, medical, or shelter services to the victim or as otherwise authorized by law. [IN DETERMINING THE AMOUNT AND METHOD OF PAYMENT OF RESTITUTION, THE COURT SHALL TAKE INTO ACCOUNT THE FINANCIAL RESOURCES OF THE DEFENDANT AND THE NATURE OF THE BURDEN ITS PAYMENT WILL IMPOSE.]

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MEMORANDUM State of Alaska

TO: Helen Fisher
Legislative Assistant to
Representative Dave Thompson

DATE: March 12, 1986

FILE NO:

TELEPHONE NO: 465-3678

FROM: Patrick W. Conheady
Assistant Attorney General
Chief, Pretrial Services

SUBJECT: Proposed CSHB 463 (Judiciary); 3/11/86 version

You have requested my analysis of the March 11 version of HB 463. In addition to the pertinent comments contained in my March 7 memorandum, I would like to add the following:

In Section 1 of the bill, new language has been added providing an exception to the prohibition on civilly compromising domestic assaults. That exception is contained in proposed AS 12.45.120(4)(A) and provides "unless the court finds that a divorce is pending between the individuals and a restraining order against further assaultive behavior has been issued." This department opposes this new provision as contrary to our stated position against compromising domestic assaults.

Such an exception will not facilitate divorce proceedings as the battering spouse will have motivation to assert the necessity of a civil compromise as a precondition to a less contentious divorce. Furthermore, fear of lapsing spousal privilege causing divorce proceedings to drag on with the pendency of a criminal assault prosecution are unfounded as the spousal privilege does not apply when one spouse is the victim of the other spouse's criminal act. See Rule 505(a)(2)(D)(i) of the Alaska Rules of Evidence.

Section 1 of the bill also contains the drafting error referred to in my initial memorandum.

Prior Section 2, facilitating payment of restitution to victim has been deleted from the bill.

Sections 2 and 3 of this version mirror section 3 and 4 of the version I prepared on March 7.

If I can be of further assistance, do not hesitate to contact me.

PWC:ejf:62

MEMORANDUM State of Alaska

TO: Helen Fisher
Legislative Assistant to
Representative Dave Thompson

DATE: March 7, 1986

FILE NO:

TELEPHONE NO: 465-3678

FROM: Patrick W. Conheady
Assistant Attorney General
Chief, Pretrial Services

SUBJECT: Proposed CSHB 463
(Judiciary)

You have requested my analysis of the proposed judiciary committee substitute for HB 463 dated February 27, 1986. In brief:

Section 1. The proposed committee substitute retains the language contained in the original version of HB 463. This language would overturn State v. Nelles, Op. No. 578 (Alaska App., February 7, 1986). The proposed CS goes a step further, however, and eliminates larcenous conduct from the list of misdemeanors not amenable to civil compromise. This would significantly broaden both the number and types of criminal cases which could be comprised, and is a step backward in terms of developing a just and rational prosecution system. The Department of Law opposes such a step, which is clearly not related to the original purpose of this bill. Also, the technical manner in which the "larcenously" language is repealed is extremely poor drafting. The new prohibition against the compromise of domestic assaults should be added as a new subsection 5. This would ensure that there would not be any confusion between the new language and that which now appears in any cross references in existing statutes and in court decisions referring to AS 12.45.120(4).

Section 2 is the amendment proposed by Representative Thompson during the hearing, plus language suggested by Public Defender Dana Fabe. The purpose of Representative Thompson's amendment was to clarify that an order of restitution or a fine resulting from a criminal conviction could be enforced by execution in the same manner as a civil judgment. We believe that this is the appropriate interpretation of the existing language in subsection (f), but the court, in a few jurisdictions, disagrees with this view. Representative Thompson's amendment would clarify the existing language and eliminate the need to litigate this issue.

During her testimony on the bill, Dana Fabe opposed the amendment because it would supposedly expose defendants to civil liability when they plead nolo contendre rather than guilty. I do not agree with Ms. Fabe's opinion on this point. Restitution and fines under AS 12.55 are criminal sanctions that may be

imposed upon any offender at sentencing. Currently, when pleading nolo, defendants may be sentenced to pay a fine or restitution. These defendants are not exposed to separate civil liability. Representative Thompson's amendment addresses only the manner in which these sanctions may be collected; in my opinion it did not expose those who plead nolo to any greater risk of civil liability than currently exists.

In a policy sense, the addition of Ms. Fabe's proposed language would insulate those who plead nolo from paying a fine or restitution unless a separate civil suit is filed. The burden upon victims, especially in misdemeanor cases (where the majority of restitution orders arise), is immense. The filing of a civil suit would require the victim to prove not only damages, but also fault. Although Alaska has an unquestionably adequate supply of lawyers (3.6 per thousand), I am not in favor of putting them to work at the expense of victims of crimes. If the language proposed by Ms. Fabe remains, we would have to oppose the entire bill. Victims have a difficult enough time collecting restitution under current law; to impede it further is indefensible.

Section 3 of the proposed substitute retains the provision permitting payment of restitution to shelters and other non-profits, but it eliminates the repeal of the provision requiring the court to make an affirmative finding of the defendant's ability to pay before a restitution order may be imposed. In intepreting the last sentence of existing AS 12.55.045(a), the Alaska Court of Appeals has held that "the trial court may not set restitution unless it first determines post incarceration earning capacity and determines that restitution award to be set will be within defendant's ability to pay." See Karr v. State, 686 P.2d 1192 (Alaska App. 1984). In effect, as I stated in my testimony at the hearing, when the court does not make this affirmative finding, any order of restitution is presumptively invalid.

In the practical world of criminal proceedings, most orders of restitution arise in district court, i.e., they result after a conviction for a misdemeanor. Mr. Svobodny, the Juneau District Attorney, and Ms. Joannides, one of his assistants, tell me that they have never witnessed a district court proceeding where this inquiry required by AS 12.55.045(a) has occurred. Representative Taylor has indicated that he did comply with the requirements of an affirmative finding when he was a judge. However, I believe that Judge Taylor was the exception in these situations. Furthermore, in any given day, a sizable number of offenders enter pleas of guilty or no contest at the initial

arraignment in court; if the courts universally complied with the current mandate of AS 12.55.045(a) to make affirmative finding prior to ordering restitution, the workload at arraignments alone would substantially increase. Finally, Representative Clocksin's assumption during the hearing that convicted offenders are under oath at the time of sentencing, is not accurrate. Offenders are generally not placed under oath, nor are they required to speak at sentencing. An offender may be able to assert a valid privilege against answering inquiries from a sentencing judge.

In my opinion, the issue here is basically one of the rights of victims versus the rights of offenders. In 1984, this state enacted a victim's bill of rights and required the inclusion of a victim impact statement as part of a presentence report in felony matters. These actions were the state's attempt to recognize that offenders are not the only individuals with cognizable rights during criminal proceedings. However, by retaining provisions in the statutes like the last sentence of AS 12.55.045(a), we are merely giving lip service to victims while upholding burdensome, statutorily-created offender rights.

As I understand it, Representative Thompson's original purpose in HB 463 was to allow restitution to be ordered to the state's shelter system, when the shelters provided care to the victim. For the shelters involved, this bill does no more than that which has been done for victims directly -- the law authorizes them to recover restitution, yet makes it practically impossible to actually collect it.

Section 4 of the proposed committee substitute is the same as the original bill.

I have prepared a proposed committee substitute which incorporates our objections to the proposed judiciary committee substitute. You will notice that in Section 3, I have drafted new language suggested by Representative Gruenberg that also addresses another concern raised by Representative Clocksin on this bill.

If I can provide further assistance, do not hesitate to contact me.

PWC:ejf

Attachment:

DEPARTMENT OF LAW

DRAFT #_____

DATE:_____

BOOKPROOFED:_____

_____

APPROVED:_____

IN THE HOUSE

CS FOR HOUSE BILL NO. 463 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the authority to compromise certain misdemeanors and to the payment of fines and restitution."

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

* Section 1. AS 12.45.120 is amended to read:

Sec. 12.45.120. AUTHORITY TO COMPROMISE MISDEMEANORS FOR WHICH VICTIM HAS CIVIL ACTION. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

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(A) a spouse or a former spouse of the defendant;

(B) a parent, grandparent, child, or grandchild of the defendant;

(C) a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(D) a person who is not a spouse or former spouse of the defendant but who lived in a spousal relationship with the defendant.

DRAFT #_____

DATE:_____

BOOKPROOFED:_____

_____

APPROVED:_____

* Sec. 2. AS 12.55.025(f) is amended to read:

(f) A sentence that the defendant pay money, either as a fine or in restitution or both, constitutes a lien in the same manner as a judgment for money entered in a civil action and may be enforced by execution in the same manner as a judgment in a civil action. Nothing in this section limits the authority of the court to otherwise enforce payment of a fine or restitution.

* Sec. 3. AS 12.55.045(a) is amended to read:

(a) The court may order a defendant convicted of an offense to make restitution as provided in this section, including restitution to a public or private nonprofit organization that has provided counseling, medical, or shelter services to the victim or as otherwise authorized by law. Before an order of restitution is entered, upon request, the defendant may have an opportunity to establish by a preponderance of the evidence the inability to pay restitution during the term of the sentence. [IN DETERMINING THE AMOUNT AND METHOD OF PAYMENT OF RESTITUTION, THE COURT SHALL TAKE INTO ACCOUNT THE FINANCIAL RESOURCES OF THE DEFENDANT AND THE NATURE OF THE BURDEN ITS PAYMENTS WILL IMPOSE.]

* Sec. 4. AS 12.55.051(a) is amended to read:

(a) If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why the defendant should not be sentenced to imprisonment for nonpayment. If the defendant fails to establish [COURT FINDS] by a preponderance of the evidence that the defendant did not intentionally refuse or fail [DEFAULT WAS ATTRIBUTABLE TO AN INTENTIONAL REFUSAL OR FAILURE] to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied. A term of imprisonment

DRAFT # 1

DATE: 3-7-86

BOOKPROOFED: _____

_____

APPROVED: _____

imposed under this section may not exceed one day for each $50 of the unpaid portion of the fine or restitution or one year, whichever is shorter. Credit shall be given toward satisfaction of the order of the court for every day a person is incarcerated for nonpayment of a fine or restitution.

SUPERIOR COURTS
DOMESTIC RELATIONS CASES
COMPOSITION OF FILINGS
FY 84

COURT	CASE TYPE					TOTAL
	DIVORCE	DISSOLUTION OF MARRIAGE	RECIPROCAL SUPPORT	DOMESTIC VIOLENCE	OTHER	
Anchorage	953	1,701	1,114	1,086	220	5,074
Barrow	4	27	8	47	5	91
Bethel	11	28	29	68	---	136
Fairbanks	294	613	217	345	20	1,489
Juneau	117	181	56	119	17	490
Kenai	67	190	66	91	11	425
Ketchikan	76	113	75	63	5	332
Kodiak	43	71	37	41	4	196
Kotzebue	16	16	28	48	---	108
Nome	20	6	32	23	---	81
Palmer	71	172	86	98	15	442
Sitka	48	44	24	34	2	152
Wrangell/ Petersburg	26	32	11	13	4	86
TOTAL	1,746	3,194	1,783	2,076	303	9,102
% OF TOTAL	19%	35%	20%	23%	3%	100%

FISCAL YEAR JULY 1 - JUNE 30

BY JUDICIAL DISTRICT

First	267	370	166	229	28	1,060
Second	40	49	68	118	5	280
Third	1,134	2,134	1,303	316	250	6,137
Fourth	305	641	246	413	20	1,625

SUPERIOR COURTS
DOMESTIC RELATIONS CASES
COMPOSITION OF FILINGS
FY 82/83

COURT	CASE TYPE					TOTAL
	DIVORCE	DISSOLUTION OF MARRIAGE	RECIPROCAL SUPPORT	DOMESTIC VIOLENCE	OTHER	
Anchorage	1,.08	1,596	1,230	914	169	4,917
Barrow	11	18	10	24	3	65
Bethel	16	33	53	58	0	160
Fairbanks	303	543	270	211	6	1,333
Juneau	112	167	95	90	1	465
Kenai	85	149	59	56	5	354
Ketchikan	69	97	79	69	7	321
Kodiak	77	58	36	43	2	217
Kotzebue	14	13	28	25	2	82
Nome	17	17	39	18	2	93
Palmer	73	134	66	34	7	314
Sitka	58	28	33	17	9	145
Wrangell/ Petersburg	24	39	9	8	0	80
TOTAL	1,867	2,892	2,007	1,567	213	8,546
% OF TOTAL	22%	34%	23%	18%	3%	100%

FISCAL YEAR JULY 1 - JUNE 30

BY JUDICIAL DISTRICT INCLUDING SERVICE AREAS

First	263	331	216	184	17	1,011
Second	42	48	77	67	7	240
Third	1,243	1,937	1,391	1,047	183	5,802
Fourth	319	576	323	269	6	1,493

SUPERIOR COURTS
DOMESTIC RELATIONS CASES
COMPOSITION OF FILINGS

FY 81/82

COURT	CASE TYPE					TOTAL
	DIVORCE	DISS. OF MARRIAGE	RECIPROCAL SUPPORT	DOMESTIC VIOLENCE	OTHER	
Anchorage	1,295	1,541	1,643	539	162	5,180
Barrow	25	14	13	27	11	90
Bethel	14	13	49	37	4	117
Fairbanks	325	486	266	170	48	1,295
Juneau	271	3	79	50	13	416
Kenai	171	33	75	53	9	341
Ketchikan	190	-	105	51	9	355
Kodiak	89	-	43	23	3	158
Kotzebue	22	-	31	31	3	87
Nome	29	3	33	7	9	81
Sitka	76	1	38	14	8	137
TOTAL	2,507	2,094	2,375	1,002	279	8,257
% OF TOTAL	30%	25%	29%	12%	3%	100%

Fiscal Year July 1 - June 30

BY JUDICIAL DISTRICT INCLUDING SERVICE AREAS

First	537	4	222	115	30	908
Second	51	3	64	38	12	168
Third	1,555	1,574	1,761	615	174	5,679
Fourth	364	513	328	234	63	1,502

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, No. 501 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG);
Cordova Women's Resource Center (CWRC); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC); MEN, Inc.;
Men's Support Network (MSN); Safe & Fear-Free Environment (SAFE);
Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SWPS);
Tundra Women's Coalition (TWC); Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

POSITION PAPER: HB 463

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit membership organization composed of twenty domestic violence and sexual assault programs throughout the state. The Network strongly supports HB 463 for the following reasons:

Section 1: As you are aware, on February 7, 1987, the Court of Appeals affirmed a decision made by Judge Crutchfield to dismiss a misdemeanor assault charge against Bruce Nelles pursuant to the misdemeanor civil compromise statute in the case STATE OF ALASKA vs. BRUCE NELLES. In this case, the Court of Appeals found that AS 12.45.120 and 12.45.130 expressly authorize the court to compromise misdemeanors and that the the court's power to dismiss is in no way conditioned upon the agreement of the prosecutor.

In the case of STATE vs. NELLES, Nelles struck his girlfriend, Mary Henry, on the mouth with his fist causing a cut which required four stitches. She stated that he had never assaulted her on any other occasion during their year together, there were no medical expenses, no loss of wages, and that she did not want civil compensation. Since the state had not suggested there was any ongoing danger to the victim, the Appeals Court found that Judge Crutchfield had not abused his discretion in dismissing the case.

The civil compromise statutes have been rarely used in the courts in domestic violence cases. Only within recent past have we seen these statutes employed for this purpose; and, until now, only in a few cases. The Network is very concerned that in light of this recent opinion, civil compromise in domestic violence cases will begin to be utilized more regularly. We strongly urge you to adopt this provision of the bill and create an additional exception to exempt domestic disputes from these statutes.

Our experience in this field tells us several things:

> -With couples who are violent, there occurs what is most often refered to as a "continuum of violence. The violence starts with a minor offense and then becomes more frequent and more intense. A recent study in Minneappolis showed there was a substantial decrease in second time offenders when a mandatory arrest policy was adopted by that community. These results agree with the work

completed by the Dobdashes, two other highly regarded researchers in the field. They have found that the messages society gives the batterer about what is permissible behavior, in the form of sanctions, has a significant impact of their future behavior. For these reason, the Municipality of Anchorage has recently adopted a no drop policy for domestic violence cases. We must send a message to batterers and their victims that domestic violence is unacceptable in any form.

-Many domestic violence cases precipitate divorce and child custody cases. Typically, battered women are afraid of what will happen to them outside of the courtroom and are therefore reluctant to testify. The batterer is in the position of power within the relationship. The Network is very concerned that the pressure for the woman to agree to civilly compromise the case could in some cases be enormous. Victims of domestic violence are not in a position to negotiate an equitable civil compromise.

Section II: We very much support this section as it would clarify that restitution could be paid to programs that offer services to victims. The Network's programs are understaffed and underfunded, and additional sources of revenue are very much needed. We feel it is entirely appropriate that some of these costs be borne by the perpetrators of these crimes.

Section III: We feel that it should be the Court's responsibility to determine the amount of restitution that should be paid by the defendant, but not whether he is able to pay. If the defendant defaults and then proves that it was neither intentional or in bad faith then the Court can adjust the amount of restitution due. It is our hope that this change will increase the amount of restitution actually paid.

ALASKA WOMEN'S LOBBY

POST OFFICE BOX 10-1571, ANCHORAGE, ALASKA 99510

February 19, 1986

To: The Honorable Mike M. Miller
Chairman
House Judiciary Committee

Re: HB 463, relating to compromise and restitution in domestic violence

Mr. Chairman and members of the Committee:

The Alaska Women's Lobby appreciates the opportunity to express it's support for the legislation before you today, HB 463.

We do believe that adding assaultive behavior to the exceptions to civil compromise will add to the protection of victims rights and elevates the seriousness of the crime. Many victims of domestic violence cannot afford legal counsel to protect their rights and allow themselves to be intimidated by the perpetrator and the defense attorney into not prosecuting because civil compromise is available.

We also favor allowing the court to order restitution to those public and private non-profit organizations which provide the victim services. Assault victims have medical and dental expenses, and require counseling and advocacy.

Reinforcing the failure to make restitution with a criminal sanction, unless the defendant proves he is unable to pay, will encourage the offender to pay the restitution.

We believe that this bill is in keeping with the seriousness of the crime of domestic violence and the need to fully protect the victims of this crime. We urge passage of HB 463.

Thank you for your consideration.

Alaska Women's Lobby
Sherrie Goll, Lobbyist

WOMEN IN CRISIS

Fear a controlling emotion in victims' lives

EDITOR'S NOTE: To protect the identity of the subject of this article, only her first name is used. But authorities say her story is typical of battered women.

By KAY LEVINE
Daily News reporter

It's not a sentimental journey into the past when Deb speaks of her second husband. He broke her nose three times, chipped her tail bone, damaged her eye. Once, she says, he beat her so brutally she was hospitalized with a case of shock that lasted two weeks.

Then, jarringly, Deb laughs. "Oh, no!" she says. It was her first husband that put her in the hospital for two weeks. She forgot. Both husbands beat her so much that it's hard to remember who did what.

"I thought everybody lived that way," Deb says.

There is some basis for that belief: At least 1.8 million women in this country are beaten each year in their homes, according to the Abused Women's Aid in Crisis center.

The organization, a non-profit corporation usually called AWAIC, offers counseling and other services to battered women, their children and the men who do the hitting.

Deb says AWAIC saved her life. Without the counseling she got there, she says would have let some man beat her to death. Deb now works at AWAIC part time, leading counseling groups three evenings a week.

It's a busy place. From Aug. 1 to Oct. 1, 1985, AWAIC saw 150 "new" victims — women who hadn't been there before. During that period, 89 women returned for their second or subsequent stays, says Ginger Halterman, shelter director.

What concerns Halterman most is her suspicion that only about half of the women who are battered report it. The others remain silent because they're afraid and because they don't know help exists, she says.

When abused women do look for help, they often begin by calling the police. Anchorage police were called to the scenes of 1,664 family disturbance complaints during 1985.

Not all the disturbances involved violence; police records do not show such a breakdown, according to officer Cathy Brewster.

Nor does the police department keep statistics on the number of homicides that are proceeded by family disturbance calls. But Brewster says national statistics — which show a pattern of increasing violence in abusive relationships — are accurate.

"Every time you go back, it escalates," she says.

The Center for Women Policy Studies in Washington, D.C., reported in 1982 that 40 percent of female homicide victims are killed by family members or boyfriends. A Kansas City study found that in half the homicide cases involving family members, police had been called to the home at least five times before the killing.

When Anchorage police respond to domestic violence complaints, they tell the battered party no one deserves to be treated like that, Brewster says.

Police tell the victim how to get court-ordered guidelines for the man to follow, which can include the requirement that he stay away from the woman completely. Police also tell victims about AWAIC.

But victims don't always listen. Some battered women would rather face known violence than trade it for unfamiliar sources of relief, says Brewster. Others don't want to publicize their problems.

"You get real frustrated with these people," she says. "You can give them the ride and provide the paperwork . . . a lot of times they won't go through with it."

According to the AWAIC volunteer training manual, a woman's refusal to accept help is based on an unconscious agreement with the man who beats her. Futilely, she tries to make the relationship work by letting him have what he seems to need: To vent his frustrations by beating her.

Deb's girlhood did everything to prepare her for such an arrangement. She had five stepfathers while she was growing up, all of whom were cruel in some way or other, although "only one" beat her severely.

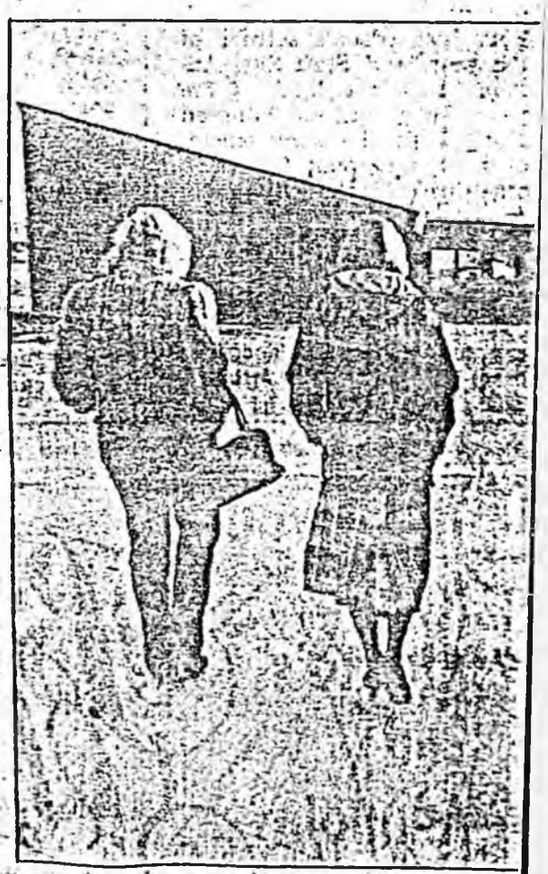
Nothing in her upbringing made her expect anything from life but insults, pain and frustration, she says. Her family moved back and forth between Kentucky and Ohio when she was young. Bleakness was the most consistent factor.

"I never had shoes when I was a kid, or clothes, or — half the time — food," she says. She can remember banging her head on the floor at the age of 2 or 3 in an attempt to interrupt her parents' shouting matches.

When Deb was 5, her parents divorced and left her and her sister with their aunt and uncle in Kentucky. The girls lived in a barn for two years because their aunt didn't want them messing up the house, says Deb.

She continued to be abused in various ways until seven years ago, when a television commercial said that life wasn't that bad for everyone, Deb says. The commercial

See Page J-3, **AWAIC**



Two workers at The Abused Women's Aid In

AWAIC: Help for victims

Continued from Page J-1

suggested there was a way out, even for her.

Deb was afraid to write down the telephone number that appeared on the screen, so she memorized it. Eleven months later, after her third broken nose, she literally crawled out the front door of her home, went to a neighbor's and dialed for help.

The number was for the crisis line at AWAIC. She had to wait two days for a room at the shelter because it was full (AWAIC has living space for 53). In the meantime, she stayed at the McKinnell Emergency Shelter, run by the Salvation Army.

AWAIC, which began in 1977, is located at 100 W. 13th Ave. The organization offers a 24-hour crisis line and living space for women and children. Clients can stay for as long as five weeks.

There are individual and group counseling for women residents and therapeutic play groups for children. AWAIC also offers support groups for women who aren't residents.

Men who want to stop violent behavior can enter an intense six-month counseling program called the Male Awareness Program. Counselors teach practical alternatives to violence, anger control and stress reduction, according to an AWAIC brocure.

Deb stayed at the shelter for three weeks. The experience turned her life around, she says.

Before she came to AWAIC, Deb had worked occasionally as a waitress, but she had never had any personal goals. She says she couldn't have imagined a career.

At the shelter, the staff began her therapy by building her self-esteem. "They told me how nice I looked and what a good mother I was," she says.

At first, she resisted the notion she had something to contribute. When a counselor suggested she put in some time as an AWAIC volunteer, "I said 'Why? I can't do anything.' "

But Deb left the shelter with short- and long-term goals: a car in three months, a mobile home within a year, a VISA card in three years and her own home in five years.

She met all her goals. And while she worked her way through the list, she used her experiences as an AWAIC volunteer and — starting in 1979 — as a paid staff member.

She worked full-time for three years, then became an engineering technician for Anchorage Water and Wastewater Utility. Deb still works at AWAIC three evening shifts per week. Most of her time is spent leading group counseling sessions for non-residents.

Deb is considering getting a college degree; she might study public relations. "I would like to not have a crisis-oriented position," she says. "It's time to move on."

She wonders if her children will be able to do the same. As in many cases, they bear heavy scars from a violent home life. Low self-esteem is the main problem, she says; and it's with children that the cycle of violence must be broken. Deb says she doesn't know how to do that: "Why is it so hard to unlearn?"

Therapy groups available

Women can call the crisis line or come to the shelter 24 hours a day. The crisis line number is 272-0100. Women needing shelter after 5 p.m. should try to call before coming so shelter staff can anticipate their arrival.

Women may come to the front office during regular office hours to seek counseling required.

The topics for each week of the four weeks include: Myths and Facts About Domestic Violence; Continuums of Battering: A Look at Social, Emotional, Physical and Sexual Abuse; Co-dependency: Can a Couple Be Addicted to Their Own Violence? and Where Do We Go From Here?

Alaska Women's Commission

Testimony
Suzanne Lombardi

HB 463

The legislative committee of the Alaska Women's Commission met February 12, 1986 and expressed support of HB 463, an act relating to Criminal Trials and Restitution.

Section I

The Commission believes that domestic violence is a violent crime that should be handled as any other assault would be by the Judiciary system.

By adding domestic violence to the list of crimes that cannot be compromised by civil action, the Alaska State Lesislature is continuing to send the messsage that this crime is clearly unacceptable.

Although, the compromise statute is not often used, a court opinion was handed down recently that reinforces the Commission's concern. In the Court of Appeals - State of Alaska vs. Nelles the court upheld the dismissal of charges and the defendent paid $100 restitution to a victim who required four stitches in her mouth due to a blow with a fist. The court said "certainly the state has a valid concern: that domestic assaults go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur."...."an ammendment to create additional exceptions is clearly a matter of legislative rather than judicial concern."

Section II

This section allows restitution to be provided to an organization that has provided counceling, medical, or shelter services to the victim.

Many women have no insurance and suffer permanent physical as well as emotional handicaps because of lack of proper medical or counceling services. Furthermore, with the severe funding cutbacks, many shelters are in great need of additional support and this bill will assure that vital services are provided to the victim.

Section III

If the defendant fails to pay restitution he must prove his inability to comply was neither intentional nor in bad faith.

The Alaska Women's Commission believes this bill is another positive step in the direction of eradicating violence in Alaska.

Introduced: 2/11/87
Referred: Judiciary and Finance

wo0727h

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

IN THE HOUSE

HOUSE BILL NO. 122

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE -- FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the authority to compromise certain misdemeanors."

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

* Section 1. AS 12.45.120 is amended to read:

Sec. 12.45.120. AUTHORITY TO COMPROMISE MISDEMEANORS FOR WHICH VICTIM HAS CIVIL ACTION. If [WHEN] a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

(1) by or upon a peace officer, judge, or magistrate while in the execution of the duties of that office;

(2) riotously;

(3) with an intent to commit a felony;

[(4) larcenously;]

(5) against

(A) a spouse or a former spouse of the defendant;

(B) a parent, grandparent, child, or grandchild of the defendant;

(C) a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(D) a person who is not a spouse or former spouse of the defendant but who previously lived in a spousal relationship with the defendant.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 122
Publish Date :

Revision Date:

Agency Affected : Public Safety
BRU : Council on Domestic Violence and Sexual Assault

Title : An Act relating to the authority to compromise certain misdemeanors

Components :

Sponsor : House Rules/Governor
Requestor : House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
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						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

JMR 2/17/87

Prepared by : Barbara Miklos, Executive Director BBM
Division : Counsel on Domestic Violence & Sexual Assaul
Phone : 465-4356
Date : 2/17/87

Approved by Commissioner : [signature]
Agency : Public Safety
Date : 2/17/87

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
Published date: 2/11/87

REQUEST
Bill/Resolution No.: 773-87-0072
Title: An Act relating to the authority to compromise certain misdemeanors.

Sponsor:
Requestor:
Date of Request 12/16/86

FISCAL DETAIL
Agency Affected: Public Safety
BRU: Council on Domestic Violence & Sexual Assault

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: Attach a separate page if necessary

Nina E. Keeler

Prepared by: Nina Keeler, Program Coordinator
Phone: 465-4356
Division: Council of Domestic Violence & Sexual Assault
Date: 12/16/86

JNR 12/16 pc Approved by Commissioner:
Date: 12/16/86
Agency: Public Safety

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

BILL NO: HB 122

DATE: February 17, 1987

TITLE: An Act relating to the authority to compromise certain misdemeanors

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports HB 122 which adds domestic assaults to the list of misdemeanors that cannot be civilly compromised.

Under Existing law (AS 12.45.120-12.45.140), a misdemeanor crime for which the injured party has a civil remedy may, except under certain circumstances, be ordered dismissed by the court if the defendant and the victim reach a civil compromise (in other words, if the defendant pays the victim money in recompense). This bill amends AS 12.45.120 to add crimes that arise from a domestic violence situation to the list of crimes that may not be civilly compromised.

Since AS 12.45.120 does not specifically exempt domestic assaults, they may be compromised civilly. This has been occurring in Fairbanks and was upheld in February, 1986 in a Court of Appeals decision (State of Alaska v. Nelles) because the Court was unwilling to judicially create an additional exception to the Civil Compromise Statute. They indicated that "amendment to create additional exceptions is clearly a matter of legislative rather than judicial concern".

However, according to legal theory cited in the Nelles appeals case, "there should be no compromise of criminal cases . . . And in practice, the civil and criminal law operate independently of one another so that resolution of a victim's civil rights and remedies has no effect on criminal prosecution" except "where a statute specifically authorizes a compromise of the criminal, as well as the civil, liability arising out of a certain conduct".

If Alaska is going to keep a statute allowing civil compromises in criminal misdemeanors, it is imperative that domestic violence cases are added to the list of exceptions. Most domestic violence assaults are classified as misdemeanors, no matter how serious they may be. Victims are put in increased jeopardy when this can be used as a mechanism for batterers to escape retribution. Victims of domestic violence are frequently pressured by the defendant or defendant's attorney to "drop charges" or to "work things out". These victims are particularly vulnerable to persuasion by the defendant, be it by promises or threats. If domestic violence victims were not faced with the option of civil compromise, a means of manipulation by the defendant, his family and friends or the defense attorney would be abolished.

As Governor Cowper stated in his letter accompanying this legislation, "The abuse of women, children and the elderly is an offense against every member of civilized society; it is emphatically not a private dispute for which a civil compromise is appropriate".

William R. Nix
Acting Commissioner

HB

125

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-6-87	1:30p.m.
H. JUD.	2-23-87	1:30p.m.

Introduced: 2/11/87
Referred: Judiciary and Finance

Human Rights Commission wo1037hb
Number 1 priority

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

IN THE HOUSE

HOUSE BILL NO. 125

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to a cause of action for certain conduct involving discriminatory harassment."

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

* Section 1. AS 09.55 is amended by adding a new section to read:

ARTICLE 8. DISCRIMINATORY HARASSMENT.

Sec. 09.55.650. DISCRIMINATORY HARASSMENT ACTION. (a) A person may maintain an action for discriminatory harassment against another person, or against the parent or legal guardian of a minor, who has caused physical injury to the person or damage to the property of the person, with the intent to intimidate or harass the person because of the person's sex, sexual orientation, race, color, religion, national origin, or physical or mental disability.

add political beliefs

(b) Actual and punitive damages may be awarded to a prevailing plaintiff in an action brought under this section. An award of damages against the parent or legal guardian of a minor under this section must be predicated upon conduct of the parent or legal guardian that is at least negligent. An award of damages under this section does not preclude a person from seeking other remedies available under law.

(c) A party filing a complaint or an answer under this section, shall serve an informational copy on the executive director of the Alaska State Commission for Human Rights.

Amend Court Rules ??

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 6, 1987

SUBJECT: Existing remedies for conduct under HB 125 (Cause of action for discriminatory harassment)

TO: Representative John Sund
Chairman, House Judiciary Committee

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a brief review of state civil and criminal laws that could apply to conduct that gives rise to a cause of action under HB 125.

Under HB 125, a plaintiff may bring a cause of action against a defendant who caused physical injury to the plaintiff or who damaged the plaintiff's property if the defendant acted with intent to intimidate or harass the plaintiff because of the plaintiff's status as a member of a listed class. The classes listed include sex, sexual orientation, race, color, religion, national origin, and physical or mental disability. They are similar to the classes protected under AS 18.80, the state human rights law. The bill permits the award of actual and punitive damages to a prevailing plaintiff, and also imposes liability on the parent or legal guardian of a minor who commits the conduct that forms the basis of the cause of action if the parent or guardian's conduct was at least negligent.

The human rights chapter, AS 18.80, prohibits discrimination because of membership in a protected class in the areas of employment, credit and financing, public accommodations, and housing. The protected classes are based on race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy or parenthood and, for employment discrimination only, physical handicap. Under AS 18.80.130(a), the commission may order hiring, reinstatement or upgrading

an employee with or without back pay, restoration to membership in a labor organization, and the like, in cases of employment discrimination. In housing discrimination cases, the commission may order the sale, lease or rental of the housing accommodation or a comparable one and actual damages that include expenses for alternate housing, storage, moving, and other actual costs.

Under AS 18.80.130(e) the commission may order payment of attorney fees to a private party if the commission determines the payment to be appropriate.

Under AS 18.80.270, a person who willfully engages in an unlawful discriminatory conduct prohibited by the chapter is guilty of a misdemeanor.

CRIMINAL MATTERS

Criminal law clearly prohibits conduct that intentionally injures a person or damages the property of another.

Under AS 11.81.900(a)(1), a person is considered to intend a specific result under the criminal laws of the state when the person's conscious objective is to cause that result. When intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective. Under AS 11.81.610(c), a person who acts intentionally will satisfy a requirement that an offense be committed with criminal negligence, recklessly, or knowingly.

The following list summarizes some of the criminal statutes that might apply to harassment or intimidation under HB 125. Copies of some of the statutes are attached for your information.

Under AS 11.61.120, a defendant is guilty of the crime of harassment if, with intent to harass or annoy another person, the defendant insults, taunts or challenges the victim in a manner likely to provoke an immediate violent response, improperly uses the telephone in certain listed ways, or subjects the victim to offensive physical contact. Conduct within the scope of HB 125 as it relates to physical injury to the plaintiff would clearly fall within the offensive physical contact paragraph.

Under 11.76.110, a defendant is guilty of interference with constitutional rights if the defendant injures the victim,

or oppresses, threatens, or intimidates the victim, intent to deprive the victim or a right, privilege, or immunity granted by the state constitution or laws or because the victim has exercised or enjoyed a right, privilege, immunity granted by the state constitution or laws. This law covers some of the same ground as HB 125.

The assault statutes, AS 11.41.200 - 11.41.250, would apply to conduct of which HB 125 is concerned. Note that under the bill, the intent required is to harass or intimidate, not to injure, while under the assault statutes, the intent requirement relates to the injury to the victim.

The criminal trespass and burglary statutes, AS 11.46.300 - 11.46.350, might also be violated by conduct that HB 125 makes the basis for liability.

In addition to these more logically connected criminal statutes, other criminal statutes might apply, depending on the nature of the defendant's actions. These include kidnapping, various degrees of sexual assault, and arson.

CIVIL CAUSES OF ACTION

The most significant change that HB 125 would make to existing civil liability is the imposition of liability on parents or guardians for the torts of minors in certain circumstances. Under AS 34.50.020, the parent or guardian of a minor is liable to a person for civil damages not to exceed $2,000 and court costs if the minor maliciously or willfully destroys real or personal property belonging to the person. There is no statute imposing liability for injury to the person, nor is liability created in case law. HB 125 would impose liability on a negligent parent or guardian for the minor's discriminatory harassment that caused personal injury or property damage.

Under HB 125, a person's sexual orientation is specifically the basis for protection. Under AS 18.80, which protects a person from discrimination on the basis of sex, right to protection on the basis of sexual orientation is not clearly set out, although the chapter may be interpreted to do so.

There are a variety of torts that might form the basis for a cause of action for conduct under HB 125. The following list is drawn from Prosser, Handbook of the Law of Torts, 5th ed.

Battery - harmful or offensive contact with a person resulting from an act intended to cause the plaintiff or a third person to sufter such contact, or apprehension that such contact is imminent. Plaintiff may recover compensation for resulting mental disturbance and for punitive damages usually.

Assault - apprehension of harmful or offensive contact where no actual contact is necessary. (Note that this conduct would be outside the scope of HB 125)

Infliction of mental distress - conduct that exceeds all bounds usually tolerated by decent society, of a nature that is especially calculated to cause and does cause mental distress of a very serious kind. This is a cause of action in transition; the limits are ill-defined.

Trespass to land - entry or casting objects or causing a third person to enter plaintiff's land or remaining on the land after permission to be there is withdrawn. No proof of damage is required.

Trespass to chattels - a direct and immediate intentional interference with a chattel in the possession of another.

Defamation - invasion of interest in reputation and good name. Statement must be communicated to another (if not, the tort of infliction of emotional distress may apply); a statement that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him is defamatory under the Restatement (2d) of Torts. Group defamation on the basis of racial, religious or political minority membership has generally not been actionable under a defamation cause of action.

Invasion of privacy - intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns (extends to eavesdropping) that is offensive or objectionable to a reasonable person.

If I may be of further assistance, please advise.

TC:csh
c7/081

Enclosure

Sec. 11.61.120. HARASSMENT. (a) A person commits the crime of harassment if, with intent to harass or annoy another person, that person

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury;

(5) subjects another person to offensive physical contact; or

(6) violates a provision of an order issued under AS 25.35.010(b) or 25.35.020 restraining the respondent from communicating directly or indirectly with the petitioner.

(b) Harassment is a class B misdemeanor.

Sec. 11.76.110. INTERFERENCE WITH CONSITTUTIONAL RIGHTS. (a) A person commits the crime of interference with constitutional rights if

(1) the person injures, oppresses, threatens, or intimidates another person with intent to deprive that person of a right, privilege, or immunity in fact granted by the constitution or laws of this state;

(2) the person intentionally injures, oppresses, threatens, or intimidates another person because that person has exercised or enjoyed a right, privilege, or immunity in fact granted by the constitution or laws of this state; or

(3) under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, the person intentionally deprives another of a right, privilege, or immunity in fact granted by the constitution or laws of this state.

(b) In a prosecution under this section, whether the injury, oppression, threat, intimidation, or deprivation concerns a right, privilege, or immunity granted by the constitution or laws of this state is a question of law.

(c) Interference with constitutional rights is a class A misdemeanor.

Sec. 11.41.200. ASSAULT IN THE FIRST DEGREE. (a) A person commits the crime of assault in the first degree if

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; or

(3) the person intentionally performs an act that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life.

(b) Assault in the first degree is a class A felony.

Sec. 11.41.210. ASSAULT IN THE SECOND DEGREE. (a) A person commits the crime of assault in the second degree if

(1) with intent to cause physical injury to another person, that person causes physical injury to another person by means of a dangerous instrument; or

(2) that person recklessly causes serious physical injury to another person.

(b) Assault in the second degree is a class B felony.

Sec. 11.41.220. ASSAULT IN THE THIRD DEGREE. (a) A person commits the crime of assault in the third degree if that person recklessly

(1) places another person in fear of imminent serious physical injury by means of a dangerous instrument; or

(2) causes physical injury to another person by means of a dangerous instrument.

(b) Assault in the third degree is a class C felony.

Sec. 11.41.230. ASSAULT IN THE FOURTH DEGREE. (a) A person commits the crime of assault in the fourth degree if

(1) that person recklessly causes physical injury to another person;

(2) with criminal negligence that person causes physical injury to another person by means of a dangerous instrument; or

(3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.

(b) Assault in the fourth degree is a class A misdemeanor.

Sec. 11.41.250. RECKLESS ENDANGERMENT. (a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(b) Reckless endangerment is a class A misdemeanor.

Sec. 11.46.300. BURGLARY IN THE FIRST DEGREE. (a) A person commits the crime of burglary in the first degree if the person violates AS 11.46.310 and

(1) the building is a dwelling; or

(2) in effecting entry or while in the building or immediate flight from the building, the person

(A) is armed with a firearm;

(B) causes or attempts to cause physical injury to a person; or

(C) uses or threaten to use a dangerous instrument.

(b) Burglary in the first degree is a class B felony.

Sec. 11.46.310. BURGLARY IN THE SECOND DEGREE. (a) A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

(b) Burglary in the second degree is a class C felony.

Sec. 11.46.320. CRIMINAL TRESPASS IN THE FIRST DEGREE. (a) A person commits the crime of criminal trespass in the first degree if the person enters or remains unlawfully

(1) on land with intent to commit a crime on the land; or

(2) in a dwelling.

(b) Criminal trespass in the first degree is a class A misdemeanor.

Sec. 11.46.330. CRIMINAL TRESPASS IN THE SECOND DEGREE. (a) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully

(1) in or upon premises; or

(2) in a propelled vehicle.

(b) Criminal trespass in the second degree is a class B misdemeanor.

Sec. 11.46.350. DEFINITION. (a) As used in AS 11.46.300 - 11.46.350, unless the context requires otherwise, "enter or remain unlawfully" means to

(1) enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at