ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8583 HOUSE JUDICIARY

HB

19

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 19

Revision Date:
Title: "...relating to the definition of "fault"...determining the liabilities of parties in civil actions..."
Sponsor: Representative Therriault
Requester: Representative Therriault

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends the definition of fault, in AS 09.17.900 (Civil Damages and Apportionment of Fault) to include intentional acts. Current state law defines fault as acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subjects a person to strict tort liability. There have been recent instances where persons have attempted to avoid liability for their acts, where a court apportions fault in a personal injury suit, by claiming that their contributory acts were intentional and not negligent or reckless and should therefore be excluded from apportionment. This bill will cure this problem and reduce litigation costs for the time and effort that must now be expended to overcome this line of defense. The bill will not have a fiscal impact.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 1/30/95

Richard I. Pegues /for

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 1/30/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 19

Revision Date:
Title: "An Act Relating to the Definition of 'Fault' ...."
Sponsor: Therriault
Requestor:

Department Affected: Administration
BRU: Risk Management
Component: Risk Management
COMPONENT SERIAL NO. 71

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: $ -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.)

There is no fiscal impact tothe Division of Risk Management.

Prepared by: Brad Thompson
Division: Risk Management
Phone: 465-2180
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 1/30/95

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Rev: 01/95
ni

Annie —

2/3/95

One other idea that would stop short of saying there can never be apportionment between intentional and unintentional tortfeasors, but would still allow the unintentional to argue that intentional tortfeasors' acts preclude liability against unintentional tortfeasors, would be:

Notwithstanding AS 09.17.080 and AS 09.17.900, the inclusion of intentional tortfeasors as parties does not preclude consideration of whether the intentional tortfeasor's acts relieve unintentiona tortfeasors of liability.

Susan

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Annie C.	From Susan C.
Co. House Jud.	Co. Juneau AGO
Dept.	Phone # 3600
Fax # 3834	Fax # 6735

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-2105

MEMORANDUM January 19, 1995

SUBJECT: House Bill 19: sectional analysis (Work Order No. 9-LS0103\A)

TO: Representative Gene Therriault
ATTN: Wilda Whittaker

FROM: Jack Chenoweth
Legislative Counsel

AS 09.17.900 provides a definition of the term "fault" as it applies to civil actions to recover damages and to the apportionment of damages when more than one party may have been at fault. The current definition identifies "fault" in terms of the defendant's conduct if that conduct was "negligent" or "reckless." The referenced bill expands the definition to add, as a third element, conduct of a defendant that was "intentional." The revision is made applicable to causes of action that accrue on or after the bill's effective date. The change implicates references to "fault" that appear in, and relate to, the liabilities of parties in joint recoveries.

AS 09.60.010, directing the courts to determine, by rule, the award of attorney fees, precludes payment of fees in certain civil actions based upon "fault," incorporating a reference to the definition of "fault" in AS 09.17.900. The bill extends the definition in that section and, by the cross-reference, implicates the attorney fee provision, hence the reference to those fees in the bill's title.

JBC:pl
95-006.plm

Letter of Intent

In adding "intentional" to the definition of "fault" in this chapter, the committee intends to make it clear that intentional ~~tortfeasors~~ parties whose actions were arguably in the categories, as well as parties who were allegedly negligent or reckless, may be named or joined and ~~found liable in actions brought under this chapter~~. ~~The committee is concerned that tortfeasors are attempting to~~ This parties may not accept (may be) trying to remove ~~themselves from several liability~~ in cases brought under this chapter by claiming that they acted intentionally, and that intentional acts or omissions are not included in the definition of "fault". ~~The committee does not, in making this amendment, intend to address the common law tradition of holding intentional wrongdoers wholly responsible for their actions~~.

AS 09.17.080. is amended by adding a new section to read:

(e) Notwithstanding Sec. 09.17.900 there is no right of ~~contribution~~ apportionment of damages in favor of persons who act with the specific intent to cause the resultant harm.

Alaska State Legislature

House of Representatives

House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

LETTER OF INTENT

In adding "intentional" to the definition of fault in this chapter, the committee intends to make it clear that parties whose actions were arguably intentional may be named or joined in the litigation, as well as those who were allegedly negligent or reckless. The inclusion of intentional tortfeasors does not preclude consideration of whether the intentional tortfeasor's acts relieve unintentional tortfeasors of liability.

_____ _____

Representative Brian Porter, Chairman Date

Memo to Annie Carpeneti
House Judiciary Committee

February 3, 1995

From Susan Cox

re: HB 19

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To Annie C.	From Susan C.
Co. House Jud.	Co. Juneau AGO
Dept.	Phone # 3600
Fax # 3834	Fax # 6735

Annie:

Please excuse my informal note, but my secretary is out and we are short staffed today. We have been mulling over your suggested amendment to AS 09.17.080, and considered the Alaska case law. We have several thoughts.

As introduced, HB 19 would include intentional torts within the definition of fault, and therefore remove any impediment to defendants who desire to add as parties to a case any intentional tortfeasors who were not sued by the plaintiff. The policy question is whether intentional and unintentional tortfeasors should then be subjected to apportionment of fault under AS 09.17.080, or whether that statute should be amended in some way to prevent such an allocation. Stated another way, should intentional tortfeasors be required to bear 100% of fault and prevented from shifting any liability to unintentional tortfeasors?

The two Alaska cases that come closest to addressing the issue of intentional fault vs. negligence both predate the current version of tort reform. In Borg-Warner v. Avco Corp., 850 P.2d 628, 633 (Alaska 1993), the Alaska Supreme Court determined that intentional tortfeasors "who act with the specific intent to cause the resultant harm" could not seek contribution from any other tortfeasor. This result was based on statutory language then in existence which provided that, "There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." Id., citing AS 09.16.090(c). That statute was repealed by the 1989 tort reform measure. In Wilson v. City of Kotzebue, 627 P.2d 623, 631 (Alaska 1981), a plaintiff who was injured in a fire that he started while incarcerated argued against the giving of comparative negligence instructions. In addressing this issue, the court made the following observation:

> The evidence submitted in this case regarding Wilson's conduct reasonably lent itself to either of two conclusions: (1) Wilson committed an intentional tort, injuring himself in the process; or (2) Wilson was so intoxicated as to be incapable of acting intentionally. The first conclusion bars Wilson's recovery regardless of any negligence on the part of Kotzebue, for a person may not recover for injuries resulting from his own intentional conduct.

Id. (emphasis added).

Neither of these cases stands for the broader proposition that the common law requires an intentional tortfeasors to bear full responsibility for all damages flowing from their conduct, nor prohibits an apportionment of fault under several liability among intentional and unintentional tortfeasors.[1] If that is what the House Judiciary Committee wants to accomplish, then the language you propose would meet this goal. Your proposal would add a subsection to AS 09.17.080 that borrows from the language in the Borg-Warner decision regarding contribution and would provide, "Notwithstanding AS 09.17.900, there shall be no right to apportionment of fault in favor of a party who acts with the specific intent to cause the resultant harm." We note that this language would not cover parties who intended to act, but did not intend the resultant harm (as in Wilson, where the plaintiff may have intended to start a fire, but presumably did not intend to hurt himself).

It is conceivable that critics may complain that this provision does not correctly reflect the common law position of an intentional tortfeasor vs. others who are merely negligent. Because we have not extensively researched the law, we cannot say whether this argument has merit. However, if the committee wanted to avoid such criticism, an alternative might be to amend AS 09.17.080 to provide that it does not require allocation of fault between intentional and unintentional tortfeasors. Legislative intent language or a statement of purpose could clarify that the change being made in AS 09.17.900 is not intended to relieve intentional tortfeasors of any portion of their liability under common law, and that unintentional tortfeasors are free to argue that the intentional torts of other parties preclude any finding or sharing of liability on their part. Another way to say this could be

"It is the intent that defendants be allowed to bring in third parties whose actions were arguably intentional as well as those who were allegedly negligent or reckless in order to have all responsible parties participate in the litigation. However, it is not intended that the inclusion of any intentional tortfeasor in the litigation result in a reduction of the intentional tortfeasor's liability at common law."

Either of these approaches presumably would satisfy the concern raised by State Farm's lobbyist. The choice is essentially a policy one. Thanks for the opportunity to have input in this issue. Please call me if you want to discuss this further.

---

[1]Due to the shortness of time, we have not conducted a review of tort law treatises or statutory plans extant in other states.

Sec. 09.17.070. Collateral benefits. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the nonsubrogated sum awarded under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that under federal law cannot be reduced or offset;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

(e) This section does not apply to a medical malpractice action filed under AS 09.55. (§ 1 ch 139 SLA 1986)

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the

damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1)

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49, 52, and 58, see §§ 5-7, ch. 139, SLA 1986, in the Temporary and Special Acts; for advance payments in medical malpractice actions, see AS 09.55.546.

Editor's notes. — 1987 Initiative Proposal No. 2, § 4 provides: "Sections 1 — 2 of this Act apply to all causes of action accruing after the effective date of this Act [March 5, 1989]."

1987 Initiative Proposal No. 2, § 5 provides: "If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 09.16.040, referred to in subsections (a) and (c), was repealed by 1987 Initiative Proposal No. 2, § 2.

NOTES TO DECISIONS

"Party" construed. — The term "party to an action" in subsection (a) should be construed to mean a litigant or other joint tortfeasor involved in the same accident. Carriere v. Cominco Alaska, Inc., 823 F. Supp. 680 (D. Alaska 1993).

"Party" for purposes of subsection (d) means parties to an action, including third-party defendants and settling parties; court did not err in refusing to allow the jury to consider the negligence of nonparties. Benner v. Wichman, 874 P.2d 949 (Alaska 1994).

Workers' Compensation Act provisions unaffected. — When the legislature enacted this section, it left intact the exclusive liability and employer reimbursement provisions of the Workers' Compensation Act. Lake v. Construction Mach., Inc., 787 P.2d 1027 (Alaska 1990).

Criminal context precluded. — This provision has no direct bearing in the criminal context, where a court's authority to require payment of restitution exists independently of its authority to order payment of damages in civil matters. Noffsinger v. State, 850 P.2d 647 (Alaska Ct. App. 1993).

Joinder of potentially liable actors. — Because the allocation of a portion of fault to nonparties is not permitted by this section, nor practical in the courtroom, the defendant must join any potentially liable actors and articulate in third-party complaints the manner in which those actors caused the plaintiff's injuries. This having been done, the trier of fact will then be able to accurately allocate a portion of fault to each party. Robinson v. U-Haul Co., 785 F. Supp. 1378 (D. Alaska 1992).

Equitable apportionment is available as a means of bringing other tortfeasors into an action. Benner v. Wichman, 874 P.2d 949 (Alaska 1994).

No contribution between joint tortfeasors. — Subsection (d) expressly and unambiguously terminated all provision for contribution between joint tortfeasors, as it was intended to create a pure several liability obligation as to each individual tortfeasor, with fault to be allocated amongst all whom the evidence in the case demonstrates to have had some percentage of fault irrespective of their party status. Carriere v. Cominco Alaska, Inc., 823 F. Supp. 680 (D. Alaska 1993).

Separate trial for contribution issues. — Although a single trial allocating fault among all potentially liable parties

may promote judicial economy, nothing in the legislative history of this section indicates that the legislature intended to require a single trial for both first-party and third-party claims. The traditional two-step system of first establishing liability and then seeking contribution is not inconsistent with the comparative negligence principles underlying the Tort Reform Act. Borg-Warner Corp. v. Avco Corp., 850 P.2d 628 (Alaska 1993).

Liability allocation among all unintentional tortfeasors. — The Tort Reform Act clearly contemplates a relative allocation of fault between all unintentional tortfeasors, whether negligent, grossly negligent or willful and wanton. Borg-Warner Corp. v. AVCO Corp., 850 P.2d 628 (Alaska 1993).

Divisible liability for vehicular negligence. — The superior court did not err in its refusal to treat fleeing arrestee motorist, pursuing police officer and municipal department as one party for purposes of fault apportionment, where it was abundantly clear that the acts and omissions of fleeing arrestee, at all relevant times, were easily distinguishable from the acts and omissions of officer and the department which had trained him. Hildebrandt v. City of Fairbanks, 863 P.2d 240 (Alaska 1993).

Employee's action against third-party tortfeasors. — Evidence of an employer's negligence may be relevant and admissible in an employee's action against third-party tortfeasors to prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury. Under this section, the finder of fact may allocate all or none of the total fault to the employer. It may not allocate only a portion of the total fault to the employer. Jury instructions must be carefully prepared to prevent a panel from attributing to the employee any negligence of the employer. Lake v. Construction Mach., Inc., 787 P.2d 1027 (Alaska 1990).

Contribution claims to which Act applicable. — The Tort Reform Act of 1986 applies only when plaintiff's injury occurred on or after June 11, 1986, the effective date of that act. It does not apply to contribution claims accruing after that date, arising from torts which occurred prior to June 11, 1986. Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988).

Contribution against joint tortfeasors. — For cases construing former AS 09.16, see Vertecs Corp. v. Fiberchem, Inc., 669 P.2d 958 (Alaska 1983); Foss Alaska Line v. Northland Servs., Inc., 724 P.2d 523 (Alaska 1986); Fellows v. Tlingit-Haida Regional Elec. Auth., 740 P.2d 428 (Alaska 1987); Tommy's Elbow Room, Inc. v. Kavorkian, 754 P.2d 243 (Alaska 1988); Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988); Providence Wash. Ins. Co. v. McGee, 764 P.2d 712 (Alaska 1988); Bohna v. Hughes, 828 P.2d 745 (Alaska 1992).

Unless a settlement is shown to be unreasonable and thereafter set aside, a settling tortfeasor must not be considered in determining the number of pro rata shares available for each remaining tortfeasor's individual liability. Colt Indus. Operating Corp. v. Frank W. Murphy Mfr., Inc., 822 P.2d 925 (Alaska 1991).

Collateral references. — Apportionment of punitive or exemplary damages as between joint tortfeasors, 20 ALR3d 666.

Propriety and effect of jury's apportionment of damages as between tortfeasors jointly and severally liable, 46 ALR3d 801.

Contribution or indemnity between joint tortfeasors on basis of relative fault, 53 ALR3d 184.

Sec. 09.17.090. Effect of release. [Repealed, § 17 ch 14 SLA 1987.]

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Alaska State Legislature

House Of Representatives

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House District 33

HB 19: "An act relating to the definition of "fault" as that term is used for the purposes of determining the liabilities of parties in civil actions, setting limitations on civil liability, and authorizing the award, in conformance with applicable court rule, of attorney fees in civil actions."

Sponsor: Representative Gene Therriault

Sponsor Statement:

This legislation is intended to clarify a gray area of state civil liability law that allows defendants to argue they are not liable for offenses they have committed intentionally. The need arises from Alaska court cases in which defendants have argued that because the law refers only to acts that are "negligent or reckless" and not specifically to acts that are "intentional," it does not allow for the apportionment of fault to those who have committed offenses intentionally. Particularly in cases in which more than one person contributes to the injuries or could be sued, the law is unclear as to whether or not the person who committed an offense intentionally can be held responsible for any of the fault. In the cases that have been heard so far, the judge has found the argument to be without merit, however, tightening the law would eliminate the need for these costly court proceedings.

DIVISION OF LEGAL SERVICES
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MEMORANDUM January 19, 1995

SUBJECT: House Bill 19: sectional analysis (Work Order No. 9-LS0103\A)

TO: Representative Gene Therriault
ATTN: Wilda Whittaker

FROM: Jack Chenoweth
Legislative Counsel

AS 09.17.900 provides a definition of the term "fault" as it applies to civil actions to recover damages and to the apportionment of damages when more than one party may have been at fault. The current definition identifies "fault" in terms of the defendant's conduct if that conduct was "negligent" or "reckless." The referenced bill expands the definition to add, as a third element, conduct of a defendant that was "intentional." The revision is made applicable to causes of action that accrue on or after the bill's effective date. The change implicates references to "fault" that appear in, and relate to, the liabilities of parties in joint recoveries.

AS 09.60.010, directing the courts to determine, by rule, the award of attorney fees, precludes payment of fees in certain civil actions based upon "fault," incorporating a reference to the definition of "fault" in AS 09.17.900. The bill extends the definition in that section and, by the cross-reference, implicates the attorney fee provision, hence the reference to those fees in the bill's title.

JBC:pl
95-006.plm

SECTIONAL ANALYSIS

HB

21

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 21

Revision Date:
Title: "...revocation of a driver's license for illegal possession or use of a controlled substance...consumption of alcohol..."
Sponsor: Representative Porter
Requester: Representative Porter

Dept. Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085-90

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill extends the driver's license revocation penalties, contained in AS 28.15, for minors who possess or use a controlled substance in violation of AS 11.71, or who possess or consume alcohol, in violation of AS 04.16.050, to include violations of municipal ordinances with substantially similar elements. The revocation of liconses is primarily an administrative process within the Department of Public Safety. The Department of Law's involvement consists of representing the Department of Public Safety (when needed) in an appeals hearing, to review a revocation. Such involvement, since the state's revocation penalties took effect last summer, has been minimal. Consequently, a fiscal impact is not expected.

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 2/1/95

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 2/1/95
Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 21

Revision Date: 01/27/95
Title: An act relating to revocation of a driver's license
Sponsor: Porter and Toohey
Requestor:

Dept. Affected: Health and Social Services
BRU: Alcohol and Drug Abuse Svcs
Component: ADA Administration
COMPONENT SERIAL NO. 302
See also (SN#):

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY95) cost: $0.0

ANALYSIS: (Attach a separate page if necessary)

This bill has no fiscal impact on the division.

Prepared by: Patty L. Olson
Division: Alcoholism & Drug Abuse
Phone:
Date: 01/27/95

Approved by Commissioner: Karen Perdue, Commissioner
Agency: Department of Health & Social Services
Date: 3-1-95

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FISCAL NOTE

STATE OF ALASKA **BILL NO:** HB21

1995 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Public Safety

Title: 'An act relating to revocation of a driver's license for illegal possession...etc... BRU: Alaska State Troopers

Component: Detachments

Sponsor: Representative Brian Porter

Requestor: _____ **COMPONENT SERIAL NO.** 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: $ -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.)

No material impact.

Prepared By: Francis C. Allan Phone: 269-5691

Division: Alaska State Troopers Date: 01/20/95

Approved by Commissioner: [signature] Date: 1/31/95

Agency: Ronald L. Otte, Dept. of Public Safety

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Rev 11/94

CS FOR HOUSE BILL NO. 21(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE TRANSPORTATION COMMITTEE

Offered: 2/10/95
Referred: Judiciary, Finance

Sponsor(s): REPRESENTATIVES PORTER AND TOOHEY

A BILL

FOR AN ACT ENTITLED

"An Act relating to revocation of a driver's license for illegal possession or use of a controlled substance or illegal possession or consumption of alcohol by a person at least 13 but not yet 21 years of age; and providing for an effective date."

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

*** Section 1.** AS 28.15.183(a) is amended to read:

(a) If a peace officer has probable cause and based on personal observation that a person who is at least 14 years of age but not yet 21 years of age has possessed or used a controlled substance in violation of AS 11.71 **or a municipal ordinance**, or possessed or consumed alcohol in violation of AS 04.16.050 **or a municipal ordinance,** and the peace officer has cited the person or arrested the person for a violation of AS 11.71, [OR] AS 04.16.050, **or the municipal ordinance,** the peace officer shall read a notice and deliver a copy to the person. The notice must advise that

(1) the department intends to revoke the person's driver's license or permit, privilege to drive, or privilege to obtain a license or permit;

(2) the person has the right to administrative review of the revocation;

(3) if the person has a driver's license or permit, the notice itself is a temporary driver's license or permit that expires seven days after it is delivered to the person;

(4) revocation of the person's driver's license or permit, privilege to drive, or privilege to obtain a license or permit, takes effect seven days after delivery of the notice to the person unless the person, within seven days, requests an administrative review.

* **Sec. 2.** AS 28.15.183(c) is amended to read:

(c) Unless the person has requested an administrative review, the department shall revoke the person's driver's license or permit, privilege to drive, or privilege to obtain a license or permit, effective seven days after delivery to the person of the notice required under (a) of this section, upon receipt of a sworn report of a peace officer

(1) that the officer had probable cause and based on personal observations that the person is at least 14 years of age but not yet 21 years of age and has possessed or used a controlled substance in violation of AS 11.71 **or a municipal ordinance**, or possessed or consumed alcohol in violation of AS 04.16.050 **or a municipal ordinance**;

(2) that the peace officer has cited the person or arrested the person for a violation of AS 11.71, [OR] AS 04.16.050**, or a municipal ordinance**;

(3) that notice under (a) of this section was provided to the person; and

(4) describing the circumstances surrounding the violation of the controlled substances provisions of AS 11.71, [OR] the alcoholic beverages provisions of AS 04.16.050**, or the municipal ordinance**.

* **Sec. 3.** AS 28.15.183(g) is amended to read:

(g) Except as provided under (h) of this section, the department may not issue a new license or reissue a license to a person whose driver's license, permit, or privilege to drive has been revoked under this section unless the person is enrolled in

and is in compliance with, or has successfully completed

(1) an alcoholism education and rehabilitation treatment program, if the revocation resulted from possession or consumption of alcohol in violation of AS 04.16.050 **or a municipal ordinance**; or

(2) a drug rehabilitation treatment program, if the revocation resulted from possession or use of a controlled substance in violation of AS 11.71 **or a municipal ordinance**.

* **Sec. 4.** AS 28.15.184(g) is amended to read:

(g) The hearing for review of a revocation by the department under AS 28.15.183 shall be limited to the issues of whether the person was at least 14 years of age but not yet 21 years of age and whether the person possessed or used a controlled substance in violation of AS 11.71 **or a municipal ordinance,** or possessed or consumed alcohol in violation of AS 04.16.050 **or a municipal ordinance**.

* **Sec. 5.** AS 28.15.185(a) is amended to read:

(a) A person who is at least 13 years of age but not older than 17 years of age who is adjudicated by a juvenile court of **(1)** misconduct involving a controlled substance under AS 11.71 or **a municipal ordinance, or (2)** possession or consumption of alcohol under AS 04.16.050 **or a municipal ordinance** is subject to revocation of the person's driver's license under (b) of this section.

* **Sec. 6.** AS 28.15.185(c) is amended to read:

(c) Upon conviction or adjudication of an offense listed in (a) of this section, the court may, upon petition of the person, review the revocation and may restore the driver's license, except a court may not restore the driver's license until

(1) at least one-half of the period of revocation imposed under this section has expired; and

(2) the person has taken and successfully completed a state approved program of drug rehabilitation if convicted of misconduct involving a controlled substance under AS 11.71 **or a municipal ordinance**, or alcohol rehabilitation if convicted of possession or consumption of alcohol under AS 04.16.050 **or a municipal ordinance**; this paragraph does not apply to a person who resides in an area that does not offer a state approved drug or alcohol rehabilitation program or a person

that the court determines does not need alcohol or drug rehabilitation.

*** Sec. 7.** APPLICABILITY. This Act applies to violations of AS 04.16.050, AS 11.71, or a municipal ordinance that occur on or after the effective date of this Act.

*** Sec. 8.** This Act takes effect July 1, 1995.

9-LS0121\G.1
Ford
2/24/95

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 21(TRA)

#2

Page 2, line 23:

Delete "a violation of AS 11.71, [OR] AS 04.16.050, or a municipal ordinance;"

Insert

"(A) a violation of AS 11.71 or AS 04.16.050; or

(B) possession or use of a controlled substance or alcohol in violation of a municipal ordinance;"

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 10, 1995 FURTHER REFERRALS: Finance

Date of Committee Action: 2/27/95

The JUDICIARY Committee considered: HB 21

HOUSE BILL NO. 21 DRIVER'S LIC REVOCATION;ALCOHOL/DRUGS

"An Act relating to revocation of a driver's license for illegal possession or use of a controlled substance or illegal possession or consumption of alcohol by a person at least 13 but not yet 21 years of age; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 21 (Jud) [X] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

[X] zero fiscal note(s) Health & Soc Ser, Public Safety, Dept. of Law [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Brian D Porter	✓			
	✓			
Betty Davis	X			
	✓			
	—			
	—			
	—			

CHAIR'S SIGNATURE Brian D Porter _____

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 21(TRA)

Page 2, line 23:

Delete "a violation of AS 11.71, [OR] AS 04.16.050, or a municipal ordinance;"

Insert

"(A) a violation of AS 11.71 or AS 04.16.050; or

(B) possession or use of a controlled substance or alcohol in violation of a municipal ordinance;"

B

HOUSE COMMITTEE REPORT

2/10/95

(7)

Date Referred: January 16, 1995

FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: 2/8/95

The TRANSPORTATION Committee considered: HB 21

HOUSE BILL NO. 21 DRIVER'S LIC REVOCATION:ALCOHOL/DRUGS

"An Act relating to revocation of a driver's license for illegal possession or use of a controlled substance or illegal possession or consumption of alcohol by a person at least 13 but not yet 21 years of age; and providing for an effective date."

recommends it be replaced with the following committee substitute - CS HB 21(TRA) [✓] the same title [ ] a new title

[ ] additional referral to _____ Committee

[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) Public Safety, Dept of Law, H+55

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
Beverly Masek	MASEK			✓	
Jeannette James	JAMES	✓			
Ed Mackean	Mackean	✓			
Tom Brice	Brice			✓	
Jerry Sanders	Sanders			✓	
Mike K. Williams	Williams	✓			
Hugh A. Davis	G. DAVIS	✓			
		(4)		(3)	

FOV

CS FOR HOUSE BILL NO. 21(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PORTER AND TOOHEY

A BILL

FOR AN ACT ENTITLED

"An Act relating to revocation of a driver's license for illegal possession or use of a controlled substance or illegal possession or consumption of alcohol by a person at least 13 but not yet 21 years of age; and providing for an effective date."

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

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(1) that the officer had probable cause **to believe** [AND BASED ON PERSONAL OBSERVATIONS] that the person is at least 14 years of age but not yet 21 years of age and has possessed or used a controlled substance in violation of AS 11.71 **or a municipal ordinance**, or possessed or consumed alcohol in violation of AS 04.16.050 **or a municipal ordinance**;

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(A) a violation of AS 11.71 or AS 04.16.050; **or**

(B) possession or use of a controlled substance or alcohol in violation of a municipal ordinance;

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municipal ordinance; this paragraph does not apply to a person who resides in an area that does not offer a state approved drug or alcohol rehabilitation program or a person that the court determines does not need alcohol or drug rehabilitation.

* **Sec. 7.** APPLICABILITY. This Act applies to violations of AS 04.16.050, AS 11.71, or a municipal ordinance that occur on or after the effective date of this Act.

* **Sec. 8.** This Act takes effect July 1, 1995.

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

SPONSOR STATEMENT

House Bill 21 closes a small, but important loophole in House Bill 299 which passed last year.

That law should be amended to include municipal ordinance as well as state law. House Bill 21 does this.

There are zero fiscal notes from the Department of Public Safety, the Department of Health and Social Services, and the Department of Law. The simple fix will cost the the state nothing, but will increase the effectiveness of the law.

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4250

Rick Mystrom, Mayor

DEPARTMENT OF LAW
Office of the Prosecutor
320 L Street, Suite 100

January 19, 1995

I am writing to express my strongest support for proposed House Bill 21, sponsored by Representative Porter.

As a state, Alaska, sorrowfully, has one of the highest incidents of alcohol abuse in the nation. Unfortunately that abuse often begins at a young age. At least 50% of all juvenile crime in Alaska is linked to alcohol. Alcohol is also a factor in a tremendous number of suicides. In fact as many as 72% of suicides by Native men aged 15 to 24 are alcohol related. Chillingly, nationwide almost 70% of juveniles who report using drugs or alcohol state their first experiences were with drugs or alcohol taken from their parents' supplies.

This abuse causes carnage on the roadway. Here in Anchorage there were 13 DWI traffic fatalities compared to 24 murders in 1994. In 1993 Alaska had the 3rd highest percentage of alcohol-related traffic deaths in the nation. Drunk drivers kill 26,000 Americans every year or 1 every 20 minutes. One and a half million people are seriously injured or crippled each year while economic losses range over $24 billion a year.

Young people generally lack the maturity of judgement to make them the best of drivers at any time. Their sense of immortality can make them disregard or fail to perceive dangers the adult driver would readily see. Couple those characteristics with a proven disposition to consume alcohol and a recipe for disaster is created. Thus, taking their driver's license is both a remedial measure which removes a likely risk from the road and a rehabilitative measure that teaches the relationship between behavior and consequences. The unpleasant consequence, loss of the license, should lead to a decrease in the frequency of the undesirable behavior. The end results will be safer roads and children growing up without the health and social risks associated with early alcohol consumption.

The language chosen for the proposed amendments is also laudable. The Court of Appeals is required to give restrictive interpretation to legislative language. Using the language selected will allow communities to explore approaches to lessening juvenile drug and alcohol abuse tailored to the community's specific needs and problems instead of forcing a complete mirroring of the state statutory prohibitions. In the long run that can only lead to more effective treatment and enforcement.

In closing, I urge the passage of House Bill 21.

Respectfully,

Carmen E. ClarkWeeks
Acting Municipal Prosecutor

HB

23

No. 1

Bill Version: HB 23

(H) Publish Date: 2/8/95

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date: February 6, 1995
Department: Commerce and Economic Development
Title: An Act relating to referrals involving dental services
BRU: Occupational Licensing
Component: Operations
Sponsor: Representative G. Davis
Requestor: Representative G. Davis
COMPONENT SERIAL #: 1844

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: $ 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)

HB 23 amends the dental statutes providing grounds for discipline, suspension, or revocation of a license if a dentist receives compensation for referring a person to another dentist or dental practice. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Admin. Officer
Phone: 465-2144
Division: Occupational Licensing
Date: 2/6/95

Approved by Commissioner: William L. Hensley
Date: 2/6/95
Agency: Commerce and Economic Development

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Session:
State Capitol
Juneau, AK 99801
(907) 465-2693

Representative Gary L. Davis

MEMORANDUM January 24, 1995

TO: Representative Con Bunde, Co-Chair
House HESS Committee
Representative Cynthia Toohey, Co-Chair
House HESS Committee

FROM: Representative Gary Davis

RE: House Bill 23, "An Act relating to referrals involving dental services."

I respectfully request that House Bill 23 be scheduled for a hearing in the HESS Committee at your earliest convenience.

House Bill 23 will prohibit the receipt of compensation by a dentist for referring a person to another dentist or dental practice. The American Dental Association Code of Ethics forbids dentists from profiting from referrals. This legislation codifies the ethical concern relating to referrals.

In Section 2, the receipt of compensation by a person or advertisement referring a dental service is prohibited unless the compensation for referral is disclosed at the time of referral. This legislation will help ensure that patients are being referred to a dentist or dental practice as a result of their quality service.

The Alaska Dental Society has had several breeches of their ethics code and their board has requested this legislation. I feel this is an appropriate legislative function of the Board of Dental Examiners under AS 08.36.315.

Thank you for considering this legislation.

SPONSOR REQUEST FOR HEARING/SPONSOR STATEMENT

Representing House District 8 - Soldotna to Seward

Alaska State Legislature

Interim:
P.O. Box 1287
Soldotna, AK 99669
(907) 262-8414

Session:
State Capitol
Juneau, AK 99801
(907) 465-2693

Representative Gary L. Davis

SECTIONAL ANALYSIS

HOUSE BILL 23

"An Act relating to referrals involving dental services."

Section 1 - Amends **AS 08.36.315. Grounds for discipline, suspension or revocation of license.** Adds a new subsection relating to the grounds for discipline, suspension, or revocation of a license for the receipt of compensation for referring a person to another dentist or dental practice.

Section 2 - Amends **AS 45.50.471 (b). Unlawful acts and practices.** Adds two new paragraphs relating to the receipt of compensation by a dentist or advertiser for referring a person to a dentist or dental practice.

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(Continued)

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3803 McCain Lp 562-7164
SANDERS DENTAL CERAMICS
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Stars Dental Laboratory
4050 Lake Otis Pkwy 561-2700
Branch 338-6000
TOOTHCRAFTERS
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Fax Line 561-3631
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Back-up for HB 23

Back-up for HB 23

American Dental Association

ADA PRINCIPLES OF ETHICS AND CODE OF PROFESSIONAL CONDUCT

American Dental Association
Council on Ethics, Bylaws and Judicial Affairs
211 East Chicago Avenue
Chicago, Illinois 60611

With official advisory opinions
revised to January, 1993

With official advisory opinions
revised to January, 1993.

ADA.

Back-up for HB 23

Principle – Section 5

PROFESSIONAL ANNOUNCEMENT.
In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the profession. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect.*

Code of Professional Conduct

5-A. ADVERTISING.
Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect.*

Advisory Opinions

1. If a dental health article, message, or newsletter is published under a dentist's byline to the public without making truthful disclosure of the source and authorship or is designed to give rise to questionable expectations for the purpose of inducing the public to utilize the services of the sponsoring dentist, the dentist is engaged in making a false or misleading representation to the public in a material respect.

2. The Council on Ethics, Bylaws and Judicial Affairs believes it would be of service to the members to provide some insight into the meaning of the term "false or misleading in a material respect." Therefore, the following examples are set forth. These examples are not meant to be all inclusive. Rather by restating the concept in alternative language and giving general examples, it is hoped that the membership will gain a better understanding of the term. With this in mind, statements shall be avoided which would: a) contain a material misrepresentation of fact, b) omit a fact necessary to make the statement considered as a whole not materially misleading, c) contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public, and d) be intended or be likely to create an unjustified expectation about results the dentist can achieve.

3. The use of an unearned or nonhealth degree in any general announcements to the public by a dentist may be a representation to the public which is false or misleading in a material respect. A dentist may use the

Back-up for HB 23

of unearned or nonhealth degrees could be misleading because of the likelihood that it will indicate to the public the attainment of a specialty or diplomate status. It may also suggest that the dentist using such is claiming superior dental skills.

For purposes of this advisory opinion, an unearned academic degree is one which is awarded by an educational institution not accredited by a generally recognized accrediting body or is an honorary degree. Generally, the use of honorary degrees or nonhealth degrees should be limited to scientific papers and curriculum vitae. In all instances state law should be consulted. In any review by the council of the use of nonhealth degrees or honorary degrees, the council will apply the standard of whether the use of such is false or misleading in a material respect.

4. A dentist using the attainment of a fellowship in a direct advertisement to the general public may be making a representation to the public which is false or misleading in a material respect. Such use of a fellowship status may be misleading because of the likelihood that it will indicate to the dental consumer the attainment of a specialty status. It may also suggest that the dentist using such is claiming superior dental skills. However, when such use does not conflict with state law, the attainment of fellowship status may be indicated in scientific papers, curriculum vitae, third party payment forms, and letterhead and stationery which is not used for the direct solicitation of patients. In any review by the council of the use of the attainment of fellowship status, the council will apply the standard of whether the use of such is false or misleading in a material respect.

5. There are two basic types of referral services for dental care: not-for-profit and the commercial.

The not-for-profit is commonly organized by dental societies or community services. It is open to all qualified practitioners in the area served. A fee is sometimes charged the practitioner to be listed with the service. A fee for such referral services is for the purpose of covering the expenses of the service and has no relation to the number of patients referred.

In contrast, experience has shown that commercial referral services generally limit access to the referral service to one dentist in a particular geographic area. Prospective patients calling the service are referred to a single subscribing dentist in the area.

The referral fee paid by the dentist. There is a connotation to such advertisements that the referral that is being made is in the nature of a public service.

A dentist is allowed to pay for any advertising permitted by the Code, but is generally not permitted to make payments to another person or entity for the referral of a patient for professional services. While the particular facts and circumstances relating to an individual commercial referral service will vary, the council believes that the aspects outlined above for commercial referral services violate the Code in that it constitutes advertising which is false or misleading in a material respect and violate the prohibitions in the Code against fee splitting.

6. An advertisement which omits a material fact or facts necessary to put the information conveyed in the advertisement in a proper context can be misleading in a material respect. An advertisement to the public of HIV negative test results, without conveying additional information that will clarify the scientific significance of this fact, is an example of a misleading omission. A dental practice should not seek to attract patients on the basis of partial truths which create a false impression.

5-B. NAME OF PRACTICE.

Since the name under which a dentist conducts his or her practice may be a factor in the selection process of the patient, the use of a trade name or an assumed name that is false or misleading in any material respect is unethical.

Use of the name of a dentist no longer actively associated with the practice may be continued for a period not to exceed one year.*

Opinion

1. Dentists leaving a practice who authorize continued use of their names should receive competent advice on the legal implications of this action. With permission of a departing dentist, his or her name may be used for more than one year, if, after the one year grace period has expired, prominent notice is provided to the public through such mediums as a sign at the office and a short statement on stationery and business cards that the departing dentist has retired from the practice.

5-C. ANNOUNCEMENT OF

Back-up for HB 23

February 25, 1994

Dr. Pitts -

These are the incidents that I know of that pertain to the dental referral service. Is this what you want?

In Fairbanks, a dentist called the dental referral service and was told that the service only referred to dentists:

who were in good standing with the dental society, and
who did high quality work

The dentist replied that this company must refer to most of the dentists in the Fairbanks area if that was the criteria which was used. The referral service then admitted that they refer to the dentists who pay them to refer.

In Anchorage a dentist expressed concern that one of his patients had called the dental referral service listed in the yellow pages for a referral to an orthodontist and made an appointment with the dentist to whom he was referred. During the initial evaluation the dentist related that because the nature of the case he would have to consult with an orthodontist.

The patient then questioned the dentist as to his qualifications because he was led to believe that he had come to an orthodontist, when in fact he had been referred to a general dentist.

Following this call to our office concerning the dental referral service, several people called the number listed in the telephone book, giving various names and home addresses in various parts of town, and requesting various specialists. No matter what zip code was given, no matter what specialist was requested, the referral service only referred to 2 practices in Anchorage. Neither office was a specialty practice. One was a member of the dental society, another was not. There are 150 dentists in the Anchorage area who are members of the dental society.

The dental referral service has never asked the dental society which dentists are in good standing.

Betty

Letter of Support - Betty Prentice
Director of Operations - AK Dental Society

Alaska Dental Society
3400 Spenard Road, Suite 10
Anchorage, Alaska 99503
(907) 277- 4675 • FAX: 274-2860

February 6, 1995

Representative Gary Davis
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Representative Davis:

The Alaska Dental Society sincerely thanks you for agreeing to sponsor HB 23 "An Act relating to referrals involving dental services." We feel this action is necessary for two main reasons - the public's protection and to comply with dentistry's national code of ethics.

We came upon this matter when the dental society office was queried by a citizen as to why the referral made to her was incorrect. After investigation, it was discovered that even though the yellow page listing said ...."our caring receptionist will tell you about the dentist nearest you who best meets your needs"....all callers were referred to the same practitioner and unbeknownst to the caller, this particular dentist was chosen because he had *paid* the referring company for referrals. The caller had asked for an orthodontist and was surprised to discover after receiving treatment by the dentist seen (and paid) that she next needed to a see a "real orthodontist" to properly finish her treatment..... Upon checking in other cities where the directory ad was placed, the same scenario was apparent as was the fact that in all instances, the caller was never informed that the dentist referred had paid for the referral.

The American Dental Association's Principles of Ethics and Code of Professional Conduct clearly states the following: "A dentist is generally not permitted to make payments to another person or entity for the referral of a patient for professional services.....it constitutes advertising which is false or misleading in a material respect and violates the prohibitions in the Code against fee splitting."

HB 23 will help in two ways. First - through the dental statutes, it says that receiving compensation for referring patients is a disciplinary offense. Second - through the unfair trade practices statute it says that any referral accompanied by pay back compensation must be disclosed in the advertising and by the referral source to the individual seeking the referral at the time the referral is made.

Again, we appreciate your assistance.

Sincerely,

Arne R. Pihl, DMD

Arne R. Pihl, DMD
President
Alaska Dental Society

LETTER OF SUPPORT

HB

25

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 25

Revision Date:
Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure...discovery..."
Sponsor: Representative Parnell
Requester: Representative Parnell

Dept. Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085-0090

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill revises Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection of evidence in criminal proceedings and, in so doing, adopts the comparable federal rule. The bill will have the effect of providing full and fair discovery to both sides in a criminal proceeding, as opposed to the existing rule which allows only the defense to discover evidence held by the prosecution. Consequently, the department believes that the bill will result in fairer verdicts and, in some cases, may avoid trials when the prosecution is given early notice of a viable defense.

Richard I. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 1/23/95

Approved by Commissioner: Richard I. Peques for Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 1/23/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HB 25

Revision Date: _____ Dept. Affected: Public Safety

Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery...." BRU: DPS Statewide

Component: Commissioner's Office

Sponsor: Representative Parnell

Requestor: (H) Judiciary COMPONENT SERIAL NO. 0523

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: $ 0.00

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.)
No significant impact on the Division of Fish and Wildlife Protection.

Prepared By: Ken Bischoff Phone: (907) 465-4336

Division: Administrative Services Date: 01/25/95

Approved by Commissioner: Ronald L. Otte Date: 01/25/95

Agency: Ronald L. Otte, Dept. of Public Safety

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9-LS0146\H
Luckhaupt
3/23/95

CS FOR HOUSE BILL NO. 25( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Porter, Green, Bunde

A BILL

FOR AN ACT ENTITLED

"An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection in criminal proceedings."

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

* **Section 1.** Rule 16, Alaska Rules of Criminal Procedure, is repealed and reenacted to read:

Rule 16. Discovery.

(a) Objectives of Pretrial Discovery.

(1) Procedures before trial should, consistent with the constitutional rights of the defendant,

(i) promote a fair and expeditious disposition of the charges, whether by diversion, plea, or trial;

(ii) provide the defendant with sufficient information to make an informed plea;

(iii) permit thorough preparation for trial and minimize surprise

at trial;

(iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving before trial a procedural, collateral, or constitutional issue;

(v) minimize the procedural and substantive inequities among similarly situated defendants;

(vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings; and

(vii) minimize the burden upon victims and witnesses.

(2) These needs can be served by

(i) full and free exchange of appropriate discovery;

(ii) simpler and more efficient procedures; and

(iii) procedural pressures for expediting the processing of cases.

(b) Disclosure to the Accused. Except as is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following to the defense and make available for inspection and copying, as appropriate:

(1) the names, addresses, and phone numbers, if known, of persons known by the government to have knowledge of relevant facts and their written or recorded statements;

(2) any written or recorded statements and any oral statements made by the accused;

(3) any written or recorded statements and any oral statements made by a co-defendant;

(4) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney is likely to use as evidence in the hearing or trial, other than models, charts, pictures, compilations of evidence, or other demonstrative evidence created by or on behalf of the prosecuting attorney;

(5) any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney is likely to call as witnesses at the hearing or

trial;

(6) any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case;

(7) any material or information within the prosecuting attorney's possession or control that tends to negate the guilt of the accused as to the offense or would tend to reduce the accused's punishment therefor;

(8) any relevant material or information relating to the guilt or innocence of the defendant which has been provided by an informant, and any electronic surveillance, including wiretapping, of conversations to which the accused or the accused's attorney was a party, or of premises of the accused or the accused's attorney;

(9) any relevant material or information regarding the relationship, if any, of witnesses to the prosecuting authority, including the nature and circumstances of any agreement, understanding, or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness; however, the prosecution does not have to disclose any payments or provision for witness travel, housing, or meals in order to enable the witness to attend a specific court proceeding;

(10) any relevant material and information regarding

(i) searches and seizures of the property or person of the defendant; and

(ii) the acquisition of statements from the accused;

(11) if the prosecution is likely to use character, reputation, or other act evidence relating to the defendant, notice of that likelihood and disclosure of the substance of that evidence;

(12) unless a different date is set by the court, as soon as known and no later than 45 days before trial, the prosecution shall provide the name, address, phone number, and curriculum vitae of any expert witness performing work in connection with the case, and (i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion, or (ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the

underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under (b)(12)(i) of this rule, the defense is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the defense; failure to provide timely disclosure shall entitle the defendant to a continuance; if the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the prosecutor from calling the expert at trial or declaring a mistrial;

(13) upon a reasonable request showing materiality to the preparation of the defense, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by (b)(1) - (12) of this rule.

(c) Disclosure to the Prosecution. Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defense shall disclose the following to the prosecution and make available for inspection and copying, as appropriate:

(1) the names and addresses of persons the defendant is likely to call as witnesses and their written or recorded statements;

(2) any books, papers, documents, photographs, or tangible objects the defense is likely to use as evidence at a hearing or trial and which are not otherwise disclosed under (c) of this rule, other than models, charts, pictures, compilations of evidence, or other demonstrative evidence created by or on behalf of the defendant's attorney;

(3) if the defense is likely to use character, reputation, or other act evidence not relating to the defendant, notice of that likelihood and disclosure of the substance of that evidence;

(4) any relevant material or information regarding the relationship, if any, of witnesses to defense counsel and the defendant, including the nature and circumstances of any agreement, understanding, or representation between the defense and the witness that constitutes an inducement for the cooperation or testimony of the witness; however, the defense does not have to disclose any payments or provisions for witness travel, housing, or meals in order to enable the witness to attend a specific court proceeding;

(5) unless a different date is set by the court, no later than 10 days before trial, notice of defenses if the defendant is likely to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense; failure to provide timely notice shall entitle the prosecutor to a continuance; if the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from asserting the designated defense;

(6) unless a different date is set by the court, as soon as known and no later than 30 days before trial, the defense shall provide the name, address, phone number, and curriculum vitae of any expert witness likely to be called at trial or another court proceeding, and (i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion, or (ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under (c)(6)(i) of this rule, the prosecution is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the prosecution; failure to provide timely disclosure shall entitle the prosecutor to a continuance; if the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from calling the expert at trial;

(7) notice of an insanity defense or a defense of diminished capacity due to mental disease or defect in compliance with AS 12.47;

(8) turn over to the prosecutor any physical evidence of the offense received by defense counsel; if the physical evidence is received from the attorney's client or the client's agent or acquired as a direct result of information communicated by the client, defense counsel may not be compelled to provide any information concerning the source of the evidence or the manner in which it was obtained; in such cases, the prosecutor may not reveal the source of the evidence to the jury; if the physical evidence is not received from the client or the client's agent or acquired as a direct result of information communicated by the client, defense counsel shall reveal the manner in which the physical evidence was obtained unless that information is

otherwise privileged;

(9) upon a reasonable request showing materiality to the preparation of the prosecution, the court in its discretion may require disclosure to the prosecution of relevant material and information not covered by (c)(1) - (8) of this rule.

(d) Regulation of Discovery.

(1) Timing of Discovery.

(i) Defense counsel has an immediate obligation to disclose evidence subject to (c)(8) of this rule.

(ii) When the prosecution has provided the discovery required under (b)(1) - (8) of this rule, the prosecuting attorney shall provide written notice to defense counsel or to the defendant if the defendant is not represented by counsel. Within 10 days of receiving notice from the prosecuting attorney, or such later date as agreed by the prosecuting attorney or ordered by the court, the defense shall provide to the prosecution the discovery required under (c)(1) and (2) of this rule.

(iii) Discovery required of the prosecution under (b)(9) - (11) and of the defense under (c)(3) and (4) of this rule shall be provided as agreed by the parties or as ordered by the court.

(iv) Other discovery required by (b) and (c) of this rule shall be provided as set out in the specific provision or as ordered by the court.

(2) Advice to Refrain From Discussing Case. Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither counsel for the parties nor other prosecution or defense personnel shall advise persons (except the accused) having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(3) Additional or Newly Discovered Information. If, subsequent to compliance with these rules or orders issued pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall

promptly notify the other party or the other party's counsel of its existence. If the additional material or information is discovered during trial, the court shall also be notified.

(4) Materials to Remain in Exclusive Custody of Attorney.

(i) Materials furnished to an attorney pursuant to these rules shall remain in the attorney's exclusive custody, shall be used only for the purposes of conducting the case, and shall be subject to other terms and conditions that the court may provide if the information is

(aa) a criminal history record of a victim or witness;

(bb) a medical, psychiatric, psychological, or counseling record of a victim or witness;

(cc) an adoption record;

(dd) a record that is confidential under as 47.10.090 or a similar law in another jurisdiction;

(ee) a report of a presentence investigation of a victim or witness prepared pursuant to Criminal Rule 32 or a similar law in another jurisdiction;

(ff) a record of the department of corrections other than Incident report relating to the crime with which the defendant is charged; or

(gg) any other record that the court orders be kept in the exclusive custody of the attorney.

(ii) An attorney shall not disclose to a defendant the residence or business address or telephone number of a victim or witness, obtained from information provided under this rule, even if the defendant is acting as co-counsel. If the address and telephone numbers of all victims and witnesses have been obliterated, materials that had contained the address or telephone number of a victim or witness may be provided to a defendant proceeding without counsel only as allowed by AS 12.61.120.

(iii) Notwithstanding a defendant's status as co-counsel, materials covered by (d)(4)(i) or (ii) of this rule shall remain in the exclusive

custody of the defendant's attorney. If an attorney violates (d)(4)(i) or (ii) of this rule, regardless of whether the defendant is co-counsel, the court shall refer the attorney's violation to the Disciplinary Board of the Alaska Bar Association as a grievance.

(iv) If a defendant is proceeding without counsel, materials covered by (d)(4)(i) of this rule may be provided to the defendant. If materials are provided to an unrepresented defendant under this paragraph, the court shall order that the materials remain in the defendant's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. The court shall also inform the defendant that violation of an order issued under this paragraph is punishable as a contempt of court.

(5) Restriction or Deferral of Disclosure of Information. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled shall be disclosed in time to permit the party's counsel to make beneficial use thereof.

(6) Material Partially Discoverable. When some parts of certain material are discoverable under these rules, and other parts are not discoverable, as much of the material shall be disclosed as is consistent with this rule. Excision of certain material and disclosure of the balance shall be preferred to withholding of the whole. Material excised pursuant to court order shall be sealed and preserved in the records of the court, and shall be made available to the court of appeals and the supreme court in the event of an appeal.

(7) Denial or Regulation of Disclosure--Disclosure to Court in Camera--Record of Proceedings. Upon request of any party, the court may permit:

(i) any showing of cause for denial or regulation of disclosure; or

(ii) any portion of any showing of cause for denial or regulation of disclosure to be made to the court in camera ex parte; a record shall be made of such proceedings; if the court enters an order granting relief following

such a showing, the entire record of the proceedings shall be sealed and preserved in the records of the court, to be made available to the court of appeals and the supreme court in the event of an appeal.

(8) Information Within Possession or Control of Other Members of Prosecuting Attorney's or Defense Counsel's Staff. The prosecuting attorney's or defense counsel's obligations under this rule extend to material and information in the possession or control of

(i) members of the prosecuting attorney's or defense counsel's staff, respectively; and

(ii) any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office or defense counsel, respectively.

(9) Legal Research and Records of Prosecuting Attorney or Defense Counsel. Disclosure shall not be required of legal research or those portions of records, correspondence, reports or memoranda that contain the opinions, theories, or conclusions of the

(i) prosecuting attorney or members of the prosecuting attorney's legal staff; or

(ii) defense counsel or members of the defense counsel's legal staff.

(e) Sanctions.

(1) Failure to Comply with Discovery Rule or Order. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court shall order such party to permit the discovery of material and information not previously disclosed or enter such other order as it deems just under the circumstances.

(2) Willful Violations. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

(f) Omnibus Hearing.

(1) Time for Hearing--When Set. If the defendant is charged with a felony, the court shall set a time for an omnibus hearing when a plea of not guilty is entered. The omnibus hearing shall be scheduled for a time when the briefing of pretrial motions should be complete.

The omnibus hearing may be cancelled by the court only upon the stipulation of counsel that there are no motions which require hearing and that discovery is complete. Counsel shall also provide the information outlined in (f)(2)(iv) of this rule.

The court may set an omnibus hearing in a misdemeanor case.

(2) Duties of Trial Court at Hearing. At the omnibus hearing the court shall:

(i) ensure that discovery under this rule is complete;

(ii) rule on any pending motions which are ripe for decision;

(iii) schedule any necessary evidentiary hearings; and

(iv) obtain case management information from the parties, including the expected length of trial, the likelihood of trial, and any anticipated scheduling difficulties.

(g) Non-Testimonial Identification Procedures.

(1) Authority. Upon application of the prosecuting attorney, the court by order may direct any person to participate in one or more of the procedures specified in (g)(2) of this rule if affidavit or testimony shows probable cause to believe that:

(i) an offense has been committed by one of several persons comprising a narrow focal group that includes the subject person;

(ii) the evidence sought may be of material aid in identifying who committed the offense; and

(iii) the evidence sought cannot practicably be obtained from other sources.

(2) Scope. An order issued under (g)(1) of this rule may direct the person to do or submit to any and all of the following:

(i) appear in a line-up;

(ii) speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under the person's fingernails;

(vii) permit the taking of samples of blood, hair, and other materials of the person's body which involve no unreasonable intrusion thereof;

(viii) provide specimens of the person's handwriting;

(ix) submit to a reasonable physical or medical inspection of the person's body.

(3) Right to Counsel. When issuing an order under (g)(1) of this rule, the court shall also order that the person be represented by counsel or waive the right to be represented by counsel before being required to appear in a lineup, give a specimen of handwriting, or speak for identification by witnesses to an offense.

(h) Material not in Possession or Control of Prosecuting Attorney; Confidential Records.

(1) Whenever defense counsel provides notice to the prosecuting attorney and designates and requests production of material or information that is not in the possession or control of the prosecuting attorney, other than confidential records under (h)(2) of this rule, but would be discoverable if in the possession or control of the prosecuting attorney, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

(2) If a defendant makes a particularized showing that confidential records not in the possession of the prosecuting attorney are likely to contain relevant information that would negate guilt, reduce the defendant's punishment, or establish bias on the part of a witness, the court may conduct an in camera review of the records upon prior notice to the person who is the subject of the records and the agency keeping the records. If the court determines during its in camera review that such information exists, the court shall provide (i) a copy of that portion of the records that contains the information to the defense, (ii) a copy of the material provided to the defense to the

prosecution, except for any statements by the defendant the disclosure of which would violate the defendant's right against compulsory self-incrimination, and shall enter an order that a hearing be held before the information may be introduced, used, or mentioned during an open court proceeding. The hearing conducted by the court will be outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by an unwarranted invasion of privacy of the subject of the records or an unwarranted hampering of the ability of the agency to collect records. The hearing to determine admissibility shall be conducted in camera if there is a danger of unwarranted invasion of privacy.

(i) As used in this rule,

(1) "oral statement" means the substance of a statement of any kind by a person, whether or not reflected in any existing writing or recording;

(2) "written or recorded statement" means

(i) any statement made by a person in writing that is signed, adopted, or approved by that person; or

(ii) the substance of a statement of any kind made by a person that is embodied or summarized in a writing or recording, whether or not specifically signed or adopted by that person; the term is intended to include statements contained in police or investigative reports, but does not include attorney work product or notes taken by the attorney.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (JUD)

Revision Date: 1/22/96
Title: "An Act revising Alaska Rule of Criminal Procedure 16, relating to discovery and inspection in criminal proceedings..."
Sponsor: Rep. Pamell
Requestor: (H) Fin

Dept. Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: $ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Public Defender Agency.

Prepared by: John Salemi, Director
Division: Public Defender Agency
Phone: 264-4400
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 1/23/96

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Rev: 12/95
nn cshb25.wpd

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. CSHB 25

Revision Date: _____
Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure relating to discovery . . ."
Sponsor: Representative Parnell
Requestor: Representative Porter

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	364.7	380.7	397.4	414.8	433.0	452.0
TRAVEL	6.0	6.0	6.0	6.0	6.0	6.0
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	370.7	386.7	403.4	420.8	439.0	458.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	370.7	386.7	403.4	420.8	439.0	458.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	370.7	386.7	403.4	420.8	439.0	458.0

Estimate of any current year (FY 95) cost: $ 0

POSITIONS:

FULL-TIME	6.0	6.0	6.0	6.0	6.0	6.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency
Phone: (907) 264-4412
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration
Date: 2/3/95

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Rev: 01/95
a/leg95/17/cshb25fn.kp6

ANALYSIS: (continued)

This bill proposes a profound change in the way criminal cases are litigated in Alaska. Under current court rule, the defense is entitled to all relevant materials concerning a case which is in the possession or control of the police/prosecutor. Under this proposal a defendant will receive full discovery only if he or she agrees to turn over information to the prosecution concerning the defense case.

The State of Alaska has long had a plea bargaining ban. Additionally, Alaska has strict sentencing provisions as regards mandatory sentences and enhanced sentences for repeat offenders. Parole release is restricted in many instances and good time deductions are not as liberal as in other jurisdictions. Ordinarily the combination of these factors would create more litigation of criminal matters. Fortunately, Alaska's full discovery provisions under Criminal Rule 16 provide the defense with an opportunity to review and evaluate the prosecution's case. Specifically, a defendant and his/her lawyer can make a knowing determination as to the propriety of pleading guilty versus exercising trial rights because of the full fund of information which is required to be provided under the current rule. As a result, more than 90 percent of Public Defender (PD) clients plead guilty or no contest.

If the rule is changed some percentage of criminal defendants will choose not to participate in reciprocal discovery. The effects will be as follows:

1. Fewer dispositions at the felony intake stage;
2. More pretrial hearings, including evidentiary hearings to "discover" facts;
3. More discovery disputes, involving lawyer and court time;
4. More gamesmanship generally with respect to criminal litigation; and
5. More trials (the most labor-intensive and costly component of criminal litigation).

It is difficult to determine to what extent individuals will opt out of the receipt of discovery from the prosecution. Until there is an experiential basis for making such a determination, the PD takes a very conservative approach to fiscal impact. No additional lawyers or clerical support are being requested. At the minimum, however, each of the 13 PD offices will need investigative support. Currently there are five offices which have no investigator position. Therefore, five investigators will be added to accommodate these offices. Additionally, the Anchorage PD office will require one additional investigator given the high volume caseload in that office location.

FISCAL ANALYSIS

6 Investigator II

Anchorage	51.5
Sitka	51.5
Kotzebue	71.0
Kodiak	55.7
Barrow	71.0
Dillingham	64.0
	364.7

Personal Services	364.7
Travel	6.0
TOTAL	370.7

Position Title	No. of Positions	Range / Step	Barg. Unit
Investigator II	6	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	72	EBA, ARA, KAA, CAA, MEA, DAA	10-26, 2, 37, 6, 37, 39

TYPE OF EXPENDITURE		AMOUNT
Salary		262,404
Benefits		102,274
Premium Pay		
Other		
Total Personal Services	0	364,678
Travel		6,000
Contractual		
Commodities		
Equipment		
Other		
Total Cost		370,678
FUNDING SOURCE FOR TOTAL COST		
Federal Receipts 1002		
G.F. Match 1003		
General Fund 1004		370,678
I-A Receipts 1007		
CIP Receipts 1061		
Other		

Justification

These six investigator positions will be necessary to meet the increased demands for defense investigation where the defendant has "opted out" the reciprocal discovery provisions. In those cases the defense lawyer/defendant will not have the benefit of police reports, witness statements, and other discovery which would ordinarily be used to prepare and evaluate the strength of the prosecution's case. Instead, the defense attorney will have to rely on defense staff investigators to interview witnesses and gather other factual information concerning the case. Except for the Anchorage position, these new positions are for PD offices where there is no investigator position.

BUDGET ANALYSIS:

6 Investigators II

Anchorage	51.5
Sitka	51.5
Kotzebue	71.0
Kodiak	55.7
Barrow	71.0
Dillingham	64.0
	364.7

Personal Services	364.7
Travel	6.0
TOTAL	370.7

8/leg95/17/cshb25np.kp6

Request For New Position

AGENCY ADMINISTRATION

BRU PUBLIC DEFENDER AGENCY

COMPONENT PUBLIC DEFENDER AGENCY

FY 96

Revised Date:

Specific Issues/Concerns

Section 1, Page 2, line 19--This subsection contains the requirement that the prosecutor provide information regarding persons who have knowledge regarding relevant facts of the case. Absent is the requirement that the phone numbers of these individuals be given to defense. This is a particularly important consideration given the dearth of investigation resources the Public Defender Agency has available. Five PD offices have no investigator whatsoever. Two offices have only a half-time person.

This section should also require disclosure of "oral statements" (as defined on page 11 of the draft) of individuals having knowledge of relevant facts. This seems only fair since the defense has to provide the prosecution with oral statements from witnesses likely to be called by the defense. See page 4, line 7.

Page 2, line 25--Subsection (b)(4) relates to tangible items which the prosecuting attorney has a duty to "discover" to the defense. It should not be limited to items "that were obtained from or belonged to the defendant". It is suggested that phrase be removed. Please note that on page 4 under subsection (c) "Disclosure to the Prosecution" the defendant has an open-ended obligation with respect to disclosing tangible objects. It does not make sense that the defense should have a larger obligation than does the prosecution.

Page 2, line 28--Subsection (b)(5) is an appropriate place to add the requirement that the prosecutor provide defense with the list of witnesses likely to be called at trial. This witness list should be provided 45 days prior to trial. See ABA Standard 11-2.1 (a)(ii).

Page 3, lines 12 and 17--The phrase "upon request of defense counsel" should be removed from both subsection (9) and (10). These provisions should be self-executing, rather than be premised on a request from defense counsel. Having such language will only foster the practice of filing boiler plate discovery motions in every case by defense counsel. This creates unneeded/unwanted paperwork for the court.

Page 4, line 12--The provision that defense counsel provide the prosecution with records of prior criminal convictions relating to witnesses is not logical. First of all, the defense does not have as ready access to computer banks regarding criminal convictions as does the prosecution. Furthermore, it is not the defendant's role to provide the prosecution with potential impeachment evidence of its own witnesses. The prosecution has adequate resources for this purpose.

Page 4, line 14--Subsection (c)(4) requires that the defense disclose "character, reputation, or other act evidence". This is the kind of provision that is going to invite discovery disputes. These disputes will be contentious, protracted and time consuming for the court and the parties. It is one thing to require the defense to provide notice of potential defenses and witnesses likely to be called. This provision goes too far in that it invades defense tactical considerations, strategy and work product. This provision must be deleted.

Page 4, line 16--Subsection (c)(5) is a mystery to me. The defense cannot provide inducements in exchange for a witness' testimony. The provision should be deleted.

Page 4, line 21--This provision (6) embraces the "notice of defense" requirement. The final phrase "...including prohibiting the defendant from asserting the designated defense" is ill advised. The notice requirements are imposed on counsel. Penalizing a defendant because of counsel's failure to give proper notice is unfair and violative of basic notions of due process. That potential sanction should be removed from the rule.

Page 4, line 28--This is the "expert witness notice" requirement (7). It should be rewritten so that a written report has to be turned over by the defense only if one has been prepared. I suggest the language "if available" be added at line 31 after the words "written report". Not every expert witness or forensic consultant should be required to write a report if they fall into the category "likely to be called at trial". Whereas the prosecution does not have to pay for reports from the crime lab, the FBI or the state medical examiner, each report prepared for defense counsel costs money. For example, a psychological evaluation in written form typically costs between $750 and $900. This is in addition to the hourly charge levied against defense for evaluation time and testing. If the legislature wishes to increase the contractual budget of the Public Defender Agency, then this provision would not be so burdensome. It should be noted that the ABA Standard regarding this provision is written in a way which does not require that a written report be prepared. The ABA Standard, found at 11-2.1(iv) should be substituted for subsections (c)(7).

Page 5, line 21--Concerning the "timing of discovery". The prosecution should notify the defendant that discovery is complete by written notice. That way there will be no dispute as to said notification. It is suggested that at line 26 the words be added after "shall notify" "in writing". In this same paragraph there is a requirement that the defense provide discovery within ten days of receiving said notice. This is not a reasonable time frame--at least not for the Public Defender Agency--given present attorney and investigation resources. The PD has 11 investigator positions statewide. As noted above, several offices are without investigative support. There is no contractual money for investigation. Similarly, the Public Defender Agency has no paralegal positions. Unlike the prosecution and Public Safety, the Public Defender Agency receives no federal funds. In the smaller Public Defender offices I can envision the timing obligation which is presently imposed on defense counsel under this proposal passing without the attorney having even read the prosecution discovery, let alone having made an investigation request and obtaining defense investigation information. It should also be noted that there doesn't appear to be any absolute deadline for the prosecution to provide discovery. With the 120-day speedy trial rule as backdrop, I believe that the timing requirement for the defense should be triggered by the trial date. I suggest we use the same timing requirement as appears on page 4, subsection (c)(7) ("30 days before trial").

Page 6, line 6--Concerning the subsection "Advice to Refrain From Discussing Case", this provision should be strengthened. It should also contain a provision for sanctions. It is the Public Defender's experience that law enforcement agents and prosecution witness/victim

coordinators sometimes engage in the practice of discouraging prosecution witnesses from meeting with defense lawyers/investigators. If we are going to have free and fair discovery, this practice should be condemned. I suggest the following change, beginning at line 7 after "protective orders": "neither counsel for the prosecution or defense or any agent thereof (including paralegals, victim/witness coordinators, investigators, law enforcement agents) shall advise...". At the end of this paragraph it is suggested that a sanction provision be added. Something on the order of "Violation of this provision can result in the individual being held in contempt of court and/or paying a monetary sanction. If a monetary sanction is imposed, it shall be paid by the individual, not by the entity for whom he/she is employed".

Page 6, line 29--I don't understand why subsection (ee) is needed. Furthermore, the proscription is not clearly stated. Are you referring to a report within a presentence investigation report, or the entire presentence investigation report?

Page 7, line 6--Subsection (ii) seems to preclude an individual proceeding without counsel from obtaining the address or telephone number of prosecution victims/witnesses. How do they investigate their case? Maybe I'm missing something.

Page 11, line 14--This subsection involves a defendant making a request for confidential information not in possession of the prosecution. The proposal requires the court, if it determines that the information exists and is relevant, to turn it over not only to the defendant, but also to the prosecution. There may be instances where this information is not subject to disclosure to the prosecution, pretrial. Therefore the requirement that the material be turned over to both parties should be excised. The court should be given discretion as to the dissemination of these materials to the prosecution.

Page 11, lines 28-32--This is part of the "oral statement" definition. On line 32 the phrase "notes taken by the attorney" is used to preclude discovery of same. What does this provision mean in the context of situations where a prosecuting attorney interviews a witness pretrial, learns additional relevant information from said interview, and naturally takes notes regarding same. The notes are a summary of an oral statement of a prosecution witness. Shouldn't this be discoverable?

Conclusion

If the legislature is going to usher in a new era with respect to criminal discovery, and this draft is the vehicle, it is the Public Defender position that the above-mentioned comments/changes are in order. As we continue to consider this proposal we may find other sections which we feel need redrafting.

Thank you for the opportunity to comment on this work draft.

JBS:sh

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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January 23, 1995

Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Ref: Comments on Proposed Amendments to
Criminal Rule 16 Governing Discovery

Dear Justices of the Supreme Court:

You have requested comments on proposed amendments to Criminal Rule 16 which governs discovery in criminal cases. The amendments proposed by a majority of the Criminal Rules Committee tinker with the existing discovery procedure, but they do not achieve the state's primary objective: full and fair discovery by both sides in a criminal case. At the same time, state legislators have introduced several bills which would adopt most of the federal provisions governing discovery. (Copies of Senate Bill No. 10 and House Bill No. 25 are attached.)

I urge the Court to adopt the Department of Law's reciprocal discovery proposal (copy attached). I believe that this proposal represents a more balanced and equitable approach to the discovery issue than does either the current rule or the proposed legislation. Under the current rule and the committee's proposed amendments, discovery is essentially a one-way street where the government is required to provide everything to the defendant and the defendant provides little in return. As a result, the government is often ambushed at trial with surprise witnesses and other evidence. Reciprocal discovery, on the other hand, accords the same discovery rights to the government and to the defendant. The Department of Law's reciprocal discovery proposal is preferable to the federal rule contained in the legislative bills because it provides both the state and defendants with witness' statements as part of the discovery process.

The current rule is simply wasteful of resources and not fair to the government. Defendants and defense counsel are thoroughly familiar with the government's case by the commencement of trial because they have had weeks, and often months, to study the government's evidence. State and municipal prosecutors, on the other hand, know little, if anything, about witnesses the defendant will call at trial or the evidence the defendant will introduce. Often, the first time they learn the identity of a defense witness is when defense counsel states in open court before the jury, "The defense calls witness X." The police have little or no time to verify the witness' testimony, and the prosecutor has little time to prepare for cross-examination of the witness. This situation occurs not only with lay witnesses, but also with expert witnesses.

Two recent murder prosecutions -- State v. Pommenville and State v. Blevins -- illustrate one of the problems with the current rule. The defendant in Pommenville was charged with killing a child; his defense was that another individual (the child's mother) inflicted the fatal injuries. The defendant provided the prosecutor a copy of an expert witness' curriculum vitae before trial, but did not provide a report setting out the substance of the expert's proposed testimony. Defense counsel did not consent to an interview of the expert by the prosecutor until approximately one hour before the expert was to take the stand at trial. After speaking with the expert, the prosecutor determined that the state could not prove causation beyond a reasonable doubt and negotiated a mid-trial plea. Had the prosecutor been able to speak with the expert and negotiate the plea prior to trial, three weeks of the judge's time, the jurors' time, the prosecutor's time and the defense attorney's time could have been saved.

The defendant in Blevins was charged in Unalaska with murdering two people. He claimed that he was insane at the time and the court ordered that he be examined by a psychiatrist, as required by AS 12.47.070. The court also ordered bifurcation of the trial into a guilt phase and an insanity phase. The court entered an order prohibiting the state from reviewing both the reports of the defense *and* state psychiatrists until the conclusion of the guilt phase of the trial. Because this would have left little time for the prosecutor in rural Alaska to prepare for the insanity phase of the proceeding (and because the court of appeals denied the state's petition for review), a pretrial plea to a lesser charge was negotiated.

The proposed amendments to Criminal Rule 16 are inadequate to cure existing problems. The prosecutors had notice of the experts in the Pommenville and Blevins cases, but they did not have the experts' reports. The judge in the Blevins case ruled that she had the authority to keep the experts' reports from the prosecutor until the middle of a bifurcated trial even though the current version of Criminal Rule 16(c)(5) expressly states that the psychiatrist's report "shall be made available to both parties." It is unlikely that the proposed amendments will change existing practice because, as in the cases discussed above, judges could construe the amendments to allow defense counsel to withhold an expert's report until the middle of trial. And, the problem is exacerbated because some defense attorneys request expert witnesses to *not* write reports of their findings, specifically to avoid having to make discovery. In an affidavit filed in State v. Olson, 1SI-S93-55 Cr., defense attorney Galen Paine made the following statement:

> I have had clients evaluated prior to trial; I cannot remember when I have ever asked for a report from an expert, no matter what the area of expertise, when I expected that I would go to trial. I do not believe I have ever asked for a report. In my experience reports simply allow the state to impeach or to attack my expert on the basis of the report itself. If I had expected trial in this matter I would not have asked for reports.

The "notice of defenses" provision in the Criminal Rules Committee's majority proposal is of little utility because it provides no information regarding what witnesses or evidence will be used to support the defense. Prosecutors will still learn the identity of defense lay witnesses in the middle of trial. Within days or weeks of its adoption, the defense bar will likely draft a checklist of defenses and defense attorneys could then file notices with numerous defenses checked in hopes of sending the prosecution on wild goose chases during the 10 days prior to trial (I understand that this defense tactic was discussed during Criminal Rules Committee meetings). Since there is nothing in the rule that would discourage defense counsel from over-designating possible defenses, over-designation is likely to become common and the notice of defenses will become meaningless.

Because the current one-sided rule is not working, this court should adopt a rule that treats the parties more equitably. Reciprocal discovery does just that. The reciprocal discovery provisions proposed by the Department of Law gives the defendant the option of "opting in" to the discovery process; that is, the defendant elects whether to participate in discovery. If the defendant requests and obtains discovery from the government, the defendant must comply with the government's requests for similar information. If the defendant elects not to participate in the discovery process, he or she receives little information from the government. [Of course, under Brady v. Maryland, 373 U.S. 83 (1963), the government must provide exculpatory evidence to the defendant, even if the defendant does not wish to participate in reciprocal discovery.] Our proposal also provides grand jury transcripts regardless of a defendant's willingness to participate in discovery.

Although the reciprocal discovery proposals by the Department of Law and state legislators are similar, there are some differences. Under the legislative proposals, all that defendants would be entitled to is discovery of their statements and criminal records. Defendants could then choose which limited types of information they wished to obtain from the government. The bill sets out three categories of evidence in the government's possession which are subject to reciprocal discovery: (1) documents and tangible objects, (2) reports of examinations and tests, and (3) expert witnesses. Defendants can chose which, if any, of these categories they wish to obtain from the government. If a defendant requests only the government's documents and tangible objects, the defendant need only provide the government with defense documents and tangible objects. Statements of witnesses are simply not available to defendants under the legislative approach.

The Department of Law's proposal does not distinguish among the categories of evidence in the government's possession. A defendant who opts in to discovery would be entitled to all discoverable information, and would be required to disclose all discoverable information in the defense's possession.

Probably the most important difference between the two proposals is their treatment of statements of government witnesses and disclosure of defense witnesses. The legislative proposals do not provide for production of a statement of a government witness under any circumstance, so production to the defendant would be

governed by Alaska's Little Jencks Act contained in AS 12.45.050-.080. Under these statutory provisions, defendants are not entitled to production of a witness' statement until the witness testifies at a preliminary hearing or at trial. The government is similarly entitled to the statements of defense witnesses after the witness has testified. Lowery v. State, 762 P.2d 457, 459-60 (Alaska App. 1988); Evidence Rule 613. Because the legislative proposal does not contain a provision allowing the defendant to request the statements of government witnesses, the defendant is not required to provide the government with statements of potential defense witnesses.

The Department of Law's proposal, on the other hand, provides for reciprocal discovery of witnesses' statements. If the defendant requests statements of the government's witnesses, the defendant must supply the names, addresses and statements of potential defense witnesses. The Department believes that its proposal leads to more discovery of the facts by both sides and is, therefore, preferable to the legislative proposal.

Criminal Rule 16 does not aid in the search for the truth; it results in trials in which one side is prepared and the other side is ambushed. I respectfully request that this Court adopt the more balanced approach contained in the Department of Law's proposal on reciprocal discovery.

Very truly yours,

Bruce M. Botelho
Attorney General

PROPOSED REVISIONS TO CRIMINAL RULE 16

(a) Leave as is.

Renumber subsection (b) as (c) and insert the following:

(b) Notice of Election to Participate in Discovery. Within 10 days of arraignment, a defendant shall file a written notice stating whether he elects to participate in discovery under this rule. The failure to file a notice shall be deemed an election not to proceed under this rule. If the defendant elects not to proceed under this rule, discovery shall be governed by AS 12.45.050-.080. The filing of a notice to participate in the discovery process under this rule shall be deemed a waiver of the privilege against self-incrimination as to the information and materials required to be disclosed to the prosecution under subsection (d). If any defendant knowingly shares in discovery obtained by a codefendant under this rule, the defendant shall be deemed to have elected to participate in the discovery process.

Current subsection (c), renumbered subsection (d) would be amended as follows (new language in bold, old language in brackets):

[(c)] (d) Disclosure to the Prosecuting Attorney.

(1) Non-Testimonial Identification Procedures -- Authority. Upon application of the prosecuting attorney, the court by order, may direct any person to participate in one or more of the procedures specified in subsection (c)(2) of this rule if affidavit or testimony shows probable cause to believe that:

(i) An offense has been committed by one of several persons comprising a narrow focal group that includes the subject person;

(ii) The evidence sought may be of material aid in identifying who committed the offense; and

(iii) The evidence sought cannot practicably be obtained from other sources.

(2) Non-Testimonial Identification Procedures -- Scope. An order issued under

subsection (c)(1) of this rule may direct the person to do or submit to any and all of the following:

(i) Appear in a line-up;

(ii) Speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) Be fingerprinted;

(vi) Pose for photographs not involving reenactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting;

(ix) Submit to a reasonable physical or medical inspection of his body.

(3) Right to Counsel. When issuing an order under subsection (c)(1) of this rule, the court shall also order that the person be represented by counsel or waive his right to be represented by counsel before being required to appear in a lineup, give a specimen of handwriting, or speak for identification by witnesses to an offense.

(4) Reports or Statements of Experts. The trial court shall require that the prosecuting attorney be informed of and permitted to inspect and to copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons. [which are intended by the defendant to be used at trial.] Information obtained by the state under the provisions of this section

shall be used only for cross-examination or rebuttal of defense testimony.

(5) Notice of Intent to Raise Insanity Defense. Following substantial compliance by the state with section [(b)] (c) of this rule a defendant who intends to offer evidence of a defense of insanity shall inform the state of such intention at the time of plea or at such other time as may be designated by the trial court. The court [may] shall order the defendant to submit to a psychiatric examination by a psychiatrist or psychologist selected by the court, and the report shall be made available to both parties. Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial.

(6) Defenses. The defendant shall inform the state of all defenses which the defendant intends to make at hearings or trial and shall furnish the state with the following material within the defendant's possession or control:

(i) The names and addresses of persons he may call as witnesses and their written or recorded statements or summaries of statements;

(ii) Any record of prior criminal convictions known to the defendant relating to the potential defense witnesses; and

(iii) Any books, papers, documents, photographs, or tangible objects the defense may use as evidence or for impeachment at a hearing or trial.

Renumber remaining subsections.

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 18, 1995

SUBJECT: Sectional Summary of HB 25. (Work Order No. 9-LS0146\A)

TO: Representative Sean Parnell
Attn: Richard Vitale

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill repeals the current version of Alaska Rule of Criminal Procedure 16, dealing with discovery in criminal cases, and adopts in its place, as the Alaska rule, Federal Rule of Criminal Procedure 16.

GPL:glc
95-063.glc

SECTIONAL SUMMARY

NOTES TO DECISIONS

Failure to comply with production order results in striking testimony or in mistrial. — Failure of the state to comply with a production order results either in striking the testimony of the witness or in a mistrial. Wright v. State, 501 P.2d 1360 (Alaska 1972).

Destruction of notes prior to trial as device to avoid production. — See note to AS 12.45.060, Notes to Decisions.

Duty of state to preserve evidence. — See note to AS 12.45.060, Notes to Decisions.

Applied in Putnam v. State, 629 P.2d 35 (Alaska 1980).

Quoted in Miller v. State, 462 P.2d 421 (Alaska 1969).

Cited in Martinez v. State, 423 P.2d 700 (Alaska 1967).

Sec. 12.45.082. Definition of "statement". In AS 12.45.060 — 12.45.080 the term "statement," in relation to any witness called by the state, means

(1) a written statement made by the witness and signed or otherwise adopted or approved by the witness; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription of the statement which is a substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement. (§ 6.09 ch 34 SLA 1962)

Revisor's notes. — Formerly AS 12.45.160. Renumbered in 1984.

NOTES TO DECISIONS

For the purposes of AS 12.45.060, "statement" is defined in subsections (1) and (2) of this section. Wright v. State, 501 P.2d 1360 (Alaska 1972).

Secs. 12.45.083 — 12.45.115. Mental disease or defect excluding responsibility and incompetency to stand trial; procedure. [Repealed, § 42 ch 143 SLA 1982. For present provisions, see AS 12.47.]

Sec. 12.45.120. Authority to compromise misdemeanors for which victim has civil action. If 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;

MEMORANDUM

State of Alaska

Department of Law
Criminal Division

To: Laurie Otto
Deputy Attorney General
CDCO - Juneau

Date: March 3, 1995

DEPT. OF LAW
MAR 06 1995
CRIMINAL DIVISION

File No:

Telephone: 269-6250

From: Cynthia M. Hora Cindy
Asst. Attorney General
OSPA - Anchorage

Subject: Discovery in Criminal Cases: An Overview of the 50 States, the Feds, and the ABA

I have reviewed the discovery statutes and court rules in other states, the federal rules governing discovery, and the old and new ABA Standards. The provisions appear to fall into five broad categories:

(1) the essentially "one-way street" approach that Alaska has adopted where the state is required to turn over a substantial amount of information and the defendant's obligation is minimal;

(2) the "mandatory" reciprocal discovery approach in which disclosure is required by both parties (I drew no distinction between discovery obligations triggered automatically and by request; note that items subject to disclosure may not be as broad as what is required in Alaska under Criminal Rule 16);

(3) the "opt-in" approach adopted in Florida in which the defendant elects to participate in discovery; if the defendant chooses to obtain discovery of the government's case, the defendant must disclose information regarding the defense case;

(4) the "hybrid" approach adopted in Georgia where disclosure of some items is mandatory, but the defendant can opt-in to reciprocal discovery of other items; and

(5) the "case law" approach where no statute or court rule governs discovery, and the "rules" are developed through case law.

The characterizations of the various provisions are based upon my review of the statute or court rule that expressly dealt with discovery. If a statute or court rule existed, no research into case law interpreting the provision was conducted due to time constraints. If the state had different procedures for felony and misdemeanor cases, I looked only at the felony provisions. I also ignored special provisions for capital cases. Case law was examined when research disclosed no governing statute or rule. Many states address alibi and mental disease or defect defenses separate from other evidence such as statements, tangible objects and scientific reports (e.g. ballistics). I note the different treatment of alibi defenses in my summaries, but not mental disease or defect defenses.

I have attached copies of the relevant provisions or case law of all 50 states, the D.C. Circuit and federal rules, and the ABA Standards. The states are in alphabetical order; the D.C., federal and ABA rules are at the end. If someone in the Department uses this summary of what other states do, I suggest she or he skims several provisions to get a better idea of what's out there.

ONE - WAY STREET -- 3 states

ALASKA CRIMINAL RULE 16

> Defendant entitled to broad discovery; court can order defendant to produce reports of experts defendant intends to call at trial

TEXAS, CH. 39, art. 39.14

> Court can order discovery "upon motion of the defendant showing good cause therefore"; government not entitled to any discovery.

UTAH CRIMINAL RULE 16

> Mandatory disclosure by government of most items upon request of defendant; defendant's duty to disclose information regarding alibi governed by statute

MANDATORY -- 19 states and New ABA Standards

ARIZONA CRIMINAL RULE 15.1

Mandatory disclosure by both sides

ARKANSAS CRIMINAL RULE 17

Defendant entitled broad discovery if request made; government has right to request production of expert reports and notice of defenses and witnesses

CALIFORNIA PENAL CODE § 1053-54

Mandatory disclosure by government; mandatory disclosure of witnesses, reports and physical evidence by defendant

CONNECTICUT RULES § 731 et. seq.

Defense entitled to the following upon request: exculpatory evidence, tangible objects, expert reports, defendant's criminal record, statements of defendant and codefendants; government can request discovery of tangible objects; government can request names of alibi witnesses, when defendant produces, government must disclose names of its witnesses; court has discretion to order government to name witnesses

HAWAII CRIMINAL RULE 16

Government disclosure triggered by defendant's written request; defendant's disclosure triggered by government's written request

IDAHO CRIMINAL RULE 16

Mandatory disclosure of Brady material; each side obtains discovery from the other by filing a written request; the failure to make a written request is deemed a waiver of the right to discovery

ILLINOIS SUPREME COURT RULES 412 and 413

Government's discovery obligation triggered by defendant's request; defendant's obligation triggered by government's request; government's right to discovery does not appear to be conditioned on defense request

MAINE CRIMINAL RULES 16 & 16A

Mandatory disclosure by government of searches, identification of defendant, statements of defendant, and Brady material; both sides can request discovery; production not dependant on other side's request. See Rule 16A(b) for an interesting provision authorizing the court to order defense experts to prepare a written report.

MINNESOTA CRIMINAL RULE 9

Both sides can request discovery from the opposing side; government's right to discovery not conditioned on defendant's request

MISSISSIPPI CRIMINAL RULE 4.06

Defendant's request for discovery triggers mandatory reciprocal obligation; defendant's obligation to provide information on alibi defense triggered by government's request; after defendant's disclosure, government must

disclose information it may use to rebut the alibi defense

MISSOURI CRIMINAL RULE 25.03 et. seq.

Both sides entitled to discovery upon written motion or request by opposing side

MONTANA 46-15-322 et. seq.

Both sides entitled to discovery

NEW MEXICO CRIMINAL PROCEDURE 5-501 and 5-502

Automatic mandatory disclosure by prosecution and defendant

NEW YORK CRIMINAL PROCEDURE LAW § 240.10 et. seq.

Both sides entitled to discovery upon demand; disclosure of witness statements for both sides does not come into play until beginning of trial

NORTH CAROLINA § 15A-901 et. seq.

Both sides entitled to request discovery

OREGON 135.805 et. seq.

Mandatory disclosure by both sides

PENNSYLVANIA RULE 305

Mandatory disclosure of statements, identifications, and prior record of defendant, expert reports, tangible objects and information regarding electronic surveillance; mandatory

disclosure of alibi witnesses, which triggers government obligation to disclose witnesses to rebut alibi

VERMONT CRIMINAL RULES 16 and 16.1

Defendant entitled to discovery upon request; defendant must disclose names and addresses of witnesses if government makes request; court has discretion to order production of medical and scientific reports of defense experts

WASHINGTON CRIMINAL RULE 4.7

Automatic mandatory disclosure by prosecution and defendant

NEW ABA STANDARDS

Broad mandatory discovery for both sides

OPT-IN -- 6 states

FLORIDA RULE 3.220

Defendant elects to engage in reciprocal discovery by filing notice; government provides information, then defendant reciprocates

NEBRASKA CRIMINAL PROCEDURE §29-1912 et. seq.

If defendant requests discovery, court may condition order on defendant's disclosure; contains specific provision that defendant waives privilege against self-incrimination for purposes of reciprocal discovery provisions.

NEW JERSEY CRIMINAL RULE 3:10 et. seq.

If defendant makes written request for discovery, defendant must provide discovery to government; defendant is required to give notice and particulars, including names of alibi witnesses

OHIO CRIMINAL RULE 16

Defendant can request various items, such as documents and tangible objects, witnesses' names and addresses, reports of experts; defendant's request triggers reciprocal obligation for same item, but government must make request

RHODE ISLAND CRIMINAL RULE 16

Defendant can ask for discovery; if request is made, government can request discovery, including names of alibi witnesses

VIRGINIA RULE 3A:11

Defendant must move for court order for discovery; court required to condition order on defendant providing discovery to government, if government request discovery

HYBRID -- 20 states, D.C. Circuit and federal courts, Old ABA Standard

ALABAMA CRIMINAL RULE 16.1

Defendant entitled to discovery of statements made by defendant or codefendants; if defendant asks for discovery of tangible objects and expert reports, government can request the same of defendant

COLORADO CRIMINAL RULE 16

Defendant must give notice of alibi defense and witnesses; prosecution must disclose various items; court may order disclosure of expert reports and defense witnesses

DELAWARE CRIMINAL RULE 16

Mandatory disclosure of defendant's statements and criminal record; if defendant asks for discovery of other items, government entitled to like items upon request

GEORGIA §17-16-1 et.seq.

Mandatory disclosure of alibi witnesses upon request of prosecution; mandatory production of witness statements by both sides at least 10 days prior to hearing or proceeding at which the witness may testify; defendant can opt-in to discovery of other evidence in the possession of the prosecution, but this triggers reciprocal obligation

IOWA CRIMINAL RULE 13

Government must turn over defendant's statements and criminal record if defense makes request; if defendant asks for discovery of tangible objects and reports of experts, government may request like items

KANSAS §22-3212

Mandatory disclosure of defendant's statements. If defendant requests discovery of other information, defendant must provide discovery to government; defendant's disclosure of alibi defense and witnesses mandatory

KENTUCKY CRIMINAL RULE 7.24

Mandatory disclosure of defendant's statements and scientific test results; defendant can request disclosure of additional items, government can request reciprocal discovery

LOUISIANA CH. 5 ART. 716 et. seq.

Mandatory disclosure of defendant's statements, criminal record; defendant's request for documents and tangible objects, and expert reports triggers mandatory reciprocal disclosure of like items; government's request for alibi evidence triggers mandatory disclosure by defendant

MARYLAND RULE 4-263

Mandatory disclosure of Brady material, defendant's statements and information regarding searches and seizures; defendant's request triggers state's disclosure obligation with respect to other items; state's request triggers defendant's obligation; defendant need not ask first

MASSACHUSETTS CRIMINAL PROCEDURE RULE 14

Mandatory disclosure of defendant's statements, statements of grand jury witnesses and Brady material. Government can request disclosure of alibi witnesses; defendant may request discovery of other items; if defendant makes request and government say it also wants discovery, court orders reciprocal discovery. Good reporter's notes on reasoning for reciprocal discovery, etc.

NEW HAMPSHIRE RULE 99

Defendant must provide notice of alibi and alibi witnesses, triggering government's duty to disclose witnesses; court has discretion to order discovery to either or both sides

NEVADA 174.235

Mandatory discovery of defendant's statements; if defendant requests other discovery, state can request court to order reciprocal discovery

NORTH DAKOTA CRIMINAL RULES 16 and 12.1

Disclosure of defendant's statements and record upon request; if defendant asks for more information, prosecution can request like items; defendant must give notice of alibi and names of alibi witnesses and then government must disclose names of witnesses to rebut alibi

SOUTH CAROLINA CRIMINAL RULE 5

Mandatory disclosure of defendant's statements and prior criminal record; if defendant requests discovery of other items, government can ask for discovery; mandatory disclosure of alibi witnesses upon government's request

SOUTH DAKOTA Chapter 23A-13 and 23A-9

Mandatory disclosure of defendant's statements and criminal record upon written request of the defendant; if defendant asks to inspect tangible objects and review expert reports, defendant must comply with government's request for disclosure of like items; statements of prosecution witnesses are not discoverable