

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10289 HOUSE JUDICIARY

734

**HB**

**348**





## Representative Eric Croft

### HB 348 Sponsor Statement

Early last year, an Alaska appellate court decision exposed a dangerous flaw in the existing legal protections for victims of domestic violence. The Strane decision opened the door for perpetrators to ignore the provisions of domestic violence restraining orders. The loophole: under Strane, the State must prove that the defendant knew that his or her conduct violated the restraining order. The defendant need only claim to have misunderstood the order, no matter how clear, as a defense to the charge.

Under the introduced legislation, only violations of a restraining order based on a reasonable misunderstanding of the terms of that order will be tolerated – unreasonable excuses will be prosecuted to the full extent of the law. Currently, if a jury believes that the defendant felt his action was not in violation of the order, no matter how unreasonable his excuse may be, the jury must acquit.

In a nutshell, the current law gives violators a “get out of jail free” card by allowing them to assert ignorance or unreasonable understanding. HB 348 takes that card away, without infringing upon the defendant’s right to a defense.



## Representative Eric Croft

**Subject:** Sectional Summary of House Bill 348, related to Violations of Domestic Violence Orders (Work Order No. 22-LSO615\L)

This bill addresses violations of domestic violence protection orders, and the standard for conviction of such violations.

**Section 1.** Amends AS 11.56.740(a) by changing the requisite mental state required for conviction.

**16 P.3d 745 STRANE V. STATE (Ct. App. 2001) 2001 Alas. App. Lexis 16****PATRICK STRANE, Appellant,****vs.****STATE OF ALASKA, Appellee.**

Court of Appeals No. A-7014, No. 1711

COURT OF APPEALS OF ALASKA

16 P.3d 745, 2001 Alas. App. LEXIS 16

January 12, 2001, Decided

Appeal from the District Court, Third Judicial District, Anchorage, John R. Lohff, Judge. Trial Court No. 3AN-98-887 Cr.

**COUNSEL**

Quinlan Steiner, Jill E. Farrell, and Michael Dieni, Assistant Public Defenders, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

**JUDGES**

Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**AUTHOR: MANNHEIMER****OPINION**

MANNHEIMER, Judge.

The Alaska Legislature has authorized the courts of this state to issue special protective orders in domestic violence cases. These protective orders can contain one or more of the types of restraining provisions listed in AS 18.66.100(c)(1)-(7).<sup>1</sup> Under AS 11.56.740(a), if a person is subject to a domestic violence protective order that contains one or more of these seven restraining provisions, it is a crime for that person to "knowingly" commit or attempt to commit an act that violates these provisions.

In this appeal, we are asked to construe this criminal statute and determine what culpable mental state, if any, the State must prove with respect to the defendant's degree of awareness that their conduct violated (or might violate) the protective order. We conclude that the statute requires proof of a culpable mental state, but the statute is irresolvably ambiguous as to whether that culpable mental state is "recklessly" or "knowingly". Construing this ambiguity against the government, we conclude that the State must prove that the defendant acted "knowingly" as that term is defined in AS 11.81.900(a)(2).

**The positions of the parties to this appeal**

The statute at issue, AS 11.56.740(a), declares:

A person commits the crime of violating a protective order if the person is subject to a

protective order containing a provision listed in AS 18.66.100(c)(1)-(7) and knowingly, commits or attempts to commit an act in violation of that provision.

The question, ultimately, is to determine what the legislature intended when it defined this crime in terms of "knowingly" committing or attempting to commit an act that violates the listed restraining provisions.<sup>2</sup>

Strane and the State approach this statute from radically different perspectives. Strane argues that the legislature used the word "knowingly" to convey the notion that the crime is committed only if the defendant understood the provision(s) of the protective order and was aware that, by their conduct, they were violating the protective order. The State argues the polar opposite. The State contends that, just as ignorance of the law does not excuse a person's violation of a criminal statute, so too ignorance or misunderstanding of the provisions of a protective order does not excuse a person's violation of that order. The State argues that a person who violates the provisions of a protective order is guilty of a crime under AS 11.56.740(a) even if they acted with no culpable mental state -- i.e., acted with absolutely no awareness that their conduct might violate the provisions of the order.

#### **The culpable mental state that would govern in the absence of a statute**

The rule at common law -- that is, the rule that would prevail in the absence of a statute -- lies in between the positions staked out by Strane and the State. Violation of a domestic violence protective order is but one specific, codified instance of the more general crime of contempt of court. In previous cases dealing with contempt of court, this court has held (1) that the applicable culpable mental state is "recklessness" (i.e., the government must prove that the defendant recklessly disregarded the possibility that their conduct violated an order of the court), and (2) that a person charged with contempt can defend by asserting that they made a **reasonable** mistake concerning the terms or the effect of the court order.

Alaska law recognizes that not all violations of a court order are contemptuous. Indirect contempt (i.e., contempt of court not committed in the judge's presence) requires proof that the defendant acted "willfully" when the defendant violated the court's order. In this context, willfulness means that the defendant was aware of, and knowingly violated, the terms of the order:

For an act of contempt to be willful, the defendant must have been aware of the requirements of the court order, and the defendant must knowingly violate the court's order. [Although some earlier cases seem] to suggest that "willfully" might require proof of a specific intent to violate a court order[, other] case law clarifies that [what is] required is an intentional act which the defendant knows violates the court order, not an act motivated by the intent to violate a court order.

**O'Brannon v. State**, 812 P.2d 222, 228 (Alaska App. 1991).

Even when a defendant has knowingly violated the terms of a court order, the defendant may

still defend by showing that there was some lawful excuse for failing to comply with the order. As the Alaska Supreme Court declared in **Johansen v. State**<sup>3</sup> :

[When we speak of disobedience] of a lawful order of the court[,] [this] connotes more than the mere failure to comply with [the] order. The word "disobey" has the connotation of wilfully failing to comply, without some lawful or reasonable excuse for not complying. If such an excuse ... is established, there can be no contempt of the authority of the court.

**Johansen**, 491 P.2d at 767 (footnote omitted).

Thus, Alaska case law on this subject is at odds with the State's position in this appeal -- the State's argument that any violation of a restraining order is contemptuous, even though the defendant acted with no culpable mental state.

On the other hand, decisions from other jurisdictions indicate that contempt can be proved even when the defendant does not subjectively "know" or understand the precise terms of the court order. Instead, the requisite "willful" failure to comply can be established by proof that the defendant recklessly disregarded the possibility that their conduct violated the requirements of a court order. This rule is illustrated most starkly in cases where defendants purposely refused to read or listen to a court order, so that they remained ignorant of the exact terms of the order. In such cases, courts have upheld contempt convictions even though the defendants could truthfully assert that they were not subjectively aware of the precise requirements of the court order.<sup>4</sup>

In **Russell v. State**,<sup>5</sup> this court adopted and implemented this interpretation of the law. The defendant in **Russell** was convicted of AS 9.50.010(10), a statute that codifies another aspect of contempt: disobedience of a properly served subpoena. Russell was subpoenaed to attend a criminal trial scheduled to commence in January 1988. When the trial was postponed until March, the trial judge ordered that all existing subpoenas would remain in effect.<sup>6</sup> Although Russell was informed that the trial had been postponed, she failed to appear in March. She claimed that she mistakenly believed that her subpoena was no longer valid once the trial was rescheduled.<sup>7</sup>

One might plausibly argue that Russell's defense amounted to a claim of "mistake of law" -- a mistake concerning the legal effect of the subpoena. However, this court characterized Russell's defense as "a mistake of fact".<sup>8</sup> This characterization makes a crucial difference. Alaska law generally does not recognize mistake of law as a defense to a criminal charge.<sup>9</sup> But under AS 11.81.620(b), a mistake of fact will constitute a defense if the mistake is reasonable and if it either negates the culpable mental state required for commission of the offense or supports a defense of justification. Accordingly, this court declared that Russell's guilt hinged on two issues: (1) did the government prove that Russell acted with at least reckless disregard of the subpoena's directive to appear?, and (2) if Russell was truly mistaken concerning the continuing effect of the subpoena, was this mistake reasonable?

The judge [who adjudicated the contempt charge] found that, at best, Russell acted recklessly

in assuming that her subpoena was no longer valid because the trial had been postponed. On this basis, the judge concluded that Russell's subjective belief that the subpoena was no longer valid did not absolve her of responsibility for contempt.

[The judge's] ruling is not error. Under AS 11.81.620(b), a mistake of fact can be a defense to a crime only when it is a reasonable mistake. There is ample evidence in the record to justify [the] finding that, if Russell actually did believe [that] she was no longer bound to appear, her mistake was not reasonable. Accordingly, [the evidence supports] Russell's conviction for contempt of court.

**Russell**, 793 P.2d at 1087.

This court's decision in **Russell** stands as a rejection of the State's position in the present appeal: the contention that a defendant's violation of a restraining order can never be excused because of the defendant's ignorance of the terms of the restraining order or the defendant's misunderstanding concerning the meaning of those terms. Under **Russell**, questions as to what conduct is required or prohibited by a court order are treated as questions of fact. When the government charges a defendant with violating a court order, the fact that the court order requires or prohibits certain conduct is the circumstance that makes the defendant's conduct a contempt.

In deciding what culpable mental state the government must prove with respect to this circumstance, **Russell** adopted the approach codified in AS 11.81.610(b)(2): when a person's conduct constitutes a crime only under a particular factual circumstance, the government normally must prove that the defendant acted "recklessly" with respect to that circumstance. In addition, **Russell** recognized that a defendant charged with violating a court order could claim the defense of reasonable mistake codified in AS 11.81.620(b). Because the court order is a factual circumstance that determines the legality of the defendant's conduct, the law will excuse the defendant's conduct if (1) the defendant made a reasonable mistake concerning the terms of the court order, and if (2) under this reasonable but mistaken interpretation of the court order, the defendant's conduct did not violate the order.

As explained above, the approach adopted in **Russell** flows from the explanations of the law of contempt contained in **O'Brannon** and **Johansen**. We therefore reaffirm that the approach taken in **Russell** is a correct interpretation of the common law of contempt -- the law that governs adjudications of contempt in the absence of a statute. Under Alaska common law, contempt requires proof that the defendant recklessly disregarded the possibility that their conduct violated a court order, and defendants are allowed to plead reasonable mistake of fact as a defense. We reject the contrary arguments that the State presents in this appeal.

#### **Interpreting the statute at issue, AS 11.56.740(a)**

The foregoing discussion of the common law does not resolve Strane's case. Strane is charged with violating a statute, AS 11.56.740(a), and not the common-law crime of contempt. The statute declares that a person commits the crime of violating a protective order if the person "knowingly" commits an act (or attempts to commit an act) that violates the protective order.

As explained above, when a statute declares that conduct is criminal only under certain circumstances, AS 11.81.610(b)(2) provides that the government must normally prove that the defendant acted "recklessly" with respect to those circumstances -- unless the statute prescribes a different culpable mental state. Here, the statute in question could be read to require proof that the defendant acted "knowingly" with respect to the inculcating circumstance (i.e., the circumstance that the defendant's conduct violated a domestic violence protective order).

The problem is that the legislature's use of the word "knowingly" is ambiguous. As explained in the legislative commentary to AS 11.81.900(a)(1)-(4),<sup>10</sup> the culpable mental state of "knowingly" can apply to conduct (in fact, it is the sole culpable mental state that applies to conduct), and it can also apply to circumstances. Thus, there are two potential ways of interpreting AS 11.81.740(a).

One interpretation is that the word "knowingly" applies to the defendant's conduct. Under this first interpretation, the statute would mirror the elements of contempt under common law. The State would have to prove that Strane knowingly engaged in conduct, that his conduct violated the terms of the protective order, and that Strane recklessly disregarded the possibility that his conduct violated the protective order. That is, the State would have to prove that Strane was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct violated the court order.<sup>11</sup> Strane could assert a defense of mistake of fact (mistake concerning the requirements of the court order), but this mistake would have to be reasonable.

On the other hand, the legislature might have intended the word "knowingly" to apply to the fact that the defendant's conduct (or attempted conduct) violated the terms of the protective order. Under this second interpretation, the State would again have to prove that Strane knowingly engaged in conduct (since "knowingly" is the only culpable mental state that applies to conduct), and that Strane's conduct violated the terms of the protective order. But instead of merely proving that Strane acted "recklessly" with respect to the circumstance that his conduct violated the court order, the State would have to prove that Strane "knowingly" disregarded the fact that his conduct violated the protective order. That is, the State would have to prove that Strane knew that his conduct violated the court order or, in the alternative, (1) that Strane was aware of a substantial probability that his conduct violated the court order and (2) that he did not actually believe that his conduct was permitted by the court order.<sup>12</sup>

In practical terms, these differing interpretations of the statute lead to two major differences in the way the criminal charge would be prosecuted and defended.

The first difference concerns the defendant's level of subjective awareness that their conduct might violate the terms of the protective order. If the culpable mental state is "recklessly", the State would have to prove only that the defendant consciously disregarded a **substantial and unjustifiable risk** that their conduct violated the protective order. But if the culpable mental state is "knowingly", the State would have to prove that the defendant **knew** that their conduct violated the protective order or, at least, that the defendant was aware of a **substantial**

probability that their conduct violated the order.

The second difference concerns the issue of whether a defendant should be found guilty if they honestly but **unreasonably** believed that their conduct was permitted by the protective order. If the culpable mental state is "recklessly", then the rule announced in **Russell** would apply: a defendant could assert a defense of "mistake of fact" under AS 11.81.620(b), but the defendant's mistake would have to be reasonable. If the defendant's mistake about the requirements of the protective order was unreasonable, it would be no defense. But if the culpable mental state is "knowingly", then any honest mistake, even an unreasonable mistake, would appear to be a good defense to the charge.

This follows from the definition of "knowingly" contained in AS 11.81.900(a)(2). Applying this definition to the crime of violating a protective order, the State would have to prove either (1) that the defendant **knew** that their conduct violated the protective order or (2) that the defendant **was aware of a substantial probability** that their conduct violated the order **unless the defendant actually believed that their conduct was permitted by the order**. Under either theory of prosecution, if the defendant honestly believed that their conduct was permitted by the protective order, this honest mistake -- even if unreasonable -- would constitute a defense to the charge.

(We note, however, that, according to the legislative commentary to AS 11.81.900(a)(2), a defendant's mistake will not be deemed honest or in good faith if the defendant is guilty of willful blindness -- that is, if the defendant "deliberately avoids acquiring [the pertinent] knowledge by closing his eyes".<sup>13</sup>)

Which interpretation of the statute did the legislature intend? The legislative history of AS 11.56.740(a) is scanty. It is clear that this statute was intended to supersede AS 11.61.120(a)(6), an earlier provision dealing with violations of protective orders that was part of the statute on "harassment". Under this former statute, it was a crime to violate a protective order if the defendant acted "with intent to harass or annoy another person".

According to the minutes of a hearing held on February 7, 1991, by the House Committee on Health, Education, and Social Services, AS 11.56.740(a) was drafted by Representative (now Lieutenant Governor) Fran Ulmer, and the goal of the statutory change was to improve legal protection for victims of domestic violence by eliminating the requirement that the State prove an intent to harass or annoy:

Representative Fran Ulmer told the committee that [House Bill 44] came as a result of conversations she has had ... with individuals in the law enforcement community as well as people who work in domestic violence shelters around the state ... who pointed out some shortcomings pertaining to the protection of victims of domestic violence.

[The bill] includes . . . a change in the harassment statute to clarify that if a person knowingly violates a provision of a domestic violence restraining order, the crime of harassment is committed. Under current law, arrests and prosecutions are not being made because it is difficult

to prove that the defendant acted with "intent" to harass.

But these committee minutes are just as ambiguous as the resulting statute itself on the question facing the court: does the culpable mental state of "knowingly" apply just to the defendant's conduct, or does it also apply to the defendant's degree of awareness that their conduct violated the protective order?

When we turn to the principles of statutory construction, we find that two common principles of construction point to opposing conclusions in this case.

The first principle is that "statutes imposing criminal liability should be construed narrowly. When the scope of a criminal statute is unclear, courts should normally construe the statute against the government -- that is, construe it so as to limit the scope of criminal liability."<sup>14</sup> Here, the question is which culpable mental state -- "recklessly" or "knowingly" -- applies to the defendant's degree of awareness that their conduct violated the terms of the protective order. If we follow the principle that ambiguous criminal statutes should be construed to limit criminal liability, we should construe AS 11.56.740(a) to require proof that the defendant acted "knowingly" with respect to this circumstance.

But the second principle is that "statutes in derogation of the common law should be construed strictly."<sup>15</sup> That is, when courts are presented with a question as to the proper construction of a statute that potentially modifies the common law, "the normal rule of interpretation is that such statutes are construed so as to preserve the pre-existing common law unless the legislature has clearly indicated its purpose to change that law."<sup>16</sup> Here, as explained above, the common law would require proof that Strane acted "recklessly" with respect to the circumstance that his conduct violated the protective order. If we follow the principle that statutes should not be construed to alter the common law unless the legislature has clearly indicated their intention to do so, we should construe AS 11.56.740(a) to require proof that Strane acted "recklessly" with respect to the circumstance that his conduct violated the protective order.

But this second principle arguably should not apply to Strane's case. As explained above, the legislature first codified this crime (violation of a protective order) as part of the harassment statute. At that time, the crime required proof of intent to harass or annoy -- an unmistakable departure from the common law. Now, under AS 11.56.740(a), the definition of the crime is closer to common-law contempt. But the statute's ancestry indicates that the legislature may still be purposefully departing from the common-law definition of the crime.

Finally, we note that both potential interpretations of the statute are reasonable. That is, policy arguments could be made in favor of each of the competing culpable mental states -- "knowingly" or "recklessly".

In these circumstances, we conclude that the principle of lenity should hold sway. The wording of the statute and its legislative history are irresolvably ambiguous on the issue before us. We can not tell which culpable mental state the legislature intended. In such a case, the law

directs us to decide in favor of individual liberty and against the government.

We therefore hold that the applicable culpable mental state is "knowingly". To prove Strane guilty of violating a protective order under AS 11.56.740(a), the State must prove that Strane acted "knowingly" with respect to the circumstance that his conduct violated the protective order. That is, the State must prove that Strane knew that his conduct violated the order or, alternatively, that Strane was aware of a substantial probability that his conduct violated the order, unless Strane actually believed that his conduct did not violate the order.

Despite the wording of the last sentence, we do not intend to express any opinion on the question of who bears the burden of production or proof on the issue of Strane's potential actual belief that his conduct did not violate the court order. With respect to any inculpatory circumstance, AS 11.81.900(a)(2) declares that a defendant's awareness of a "substantial probability" of the existence of that circumstance is enough to establish guilt " **unless** the [defendant] actually believes [that the circumstance] does not exist". (Emphasis added.) As we have explained, this statutory definition allows a defense for honest but unreasonable mistakes of fact -- a broader defense than the reasonable mistake of fact defense codified in AS 11.81.620(b). But based on the wording of AS 11.81.900(a)(2), it is conceivable that an honest, unreasonable mistake is an "exception" to criminal liability -- meaning that the defendant would bear the burden of proof on this issue, or at least the burden of coming forward with evidence.<sup>17</sup>

### Conclusion

The district court ruled that even if Strane had a good-faith belief that his conduct did not violate the terms of the protective order, this belief was irrelevant to his guilt or innocence under AS 11.56.740(a). We have concluded that this ruling was error. Even at common law, a reasonable mistake concerning the requirements of a court order is a potential defense to a charge of contempt. And, because we have construed AS 11.56.740(a) to require proof that a defendant acted "knowingly" with regard to the circumstance that their conduct violated the protective order, Strane can potentially defend on the basis of a good-faith mistake concerning the terms of the protective order, even if that mistake was objectively unreasonable.

Strane was convicted at a bench trial. Normally, when a defendant is tried without a jury and we later conclude that the trial judge applied the wrong law in finding the defendant guilty, we would vacate the defendant's conviction and direct the trial judge to re-assess the defendant's guilt or innocence under the proper law. But here, Strane agreed to a bench trial only after the district court ruled that he could not defend the charge by asserting a good-faith mistake. Under these circumstances, we conclude that Strane should be given a choice: either to consent to a second bench trial, or to rescind his waiver of jury trial and be tried by jury.

Strane's conviction for violating a protective order is **REVERSED**, and this case is remanded to the district court for further proceedings on the complaint.

### DISPOSITION

**Strane's conviction for violating a protective order REVERSED, and this case remanded to the**

district court for further proceedings on the complaint.

#### OPINION FOOTNOTES

1 These seven provisions of AS 18.66.100(c) authorize a court to:

(1) prohibit the respondent from threatening to commit or committing domestic violence, stalking, or harassment;

(2) prohibit the respondent from telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner;

(3) remove and exclude the respondent from the residence of the petitioner, regardless of [the] ownership of the residence;

(4) direct the respondent to stay away from the residence, school, or place of employment of the petitioner or any specified place frequented by the petitioner or any designated household member;

(5) prohibit the respondent from entering a propelled vehicle in the possession of or occupied by the petitioner;

(6) prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence; [and]

(7) direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence[.]

2 "The guiding principle of statutory construction is to ascertain and implement the intent of the legislature." *Sakeagak v. State*, 952 P.2d 278, 284 (Alaska App. 1998) (citing *Millman v. State*, 841 P.2d 190, 194 (Alaska App. 1992)).

3 491 P.2d 759 (Alaska 1971).

4 See *Vermont Women's Health Center v. Operation Rescue*, 159 Vt. 141, 617 A.2d 411, 415-16 (Vt. 1992); *People v. Poe*, 236 Cal. App. 2d Supp. 928, 47 Cal. Rptr. 670, 677-78 (Cal. App. 1965); *United States v. Southern Wholesale Grocers' Ass'n*, 207 F. 434, 444 (N.D. Ala. 1913).

5 793 P.2d 1085 (Alaska App. 1990).

6 See *id.* at 1087.

7 See *id.*

8 See *id.*

9 AS 11.81.620(a) declares: "Knowledge, recklessness, or criminal negligence as to whether conduct constitutes an offense, or knowledge, recklessness, or criminal negligence as to the existence, meaning, or application of the provision of law defining an offense, is not an element of an offense unless the provision of law clearly so provides."

10 See 1978 Senate Journal, Supp. No. 47 (June 12th), pp. 139-142.

11 See AS 11.81.900(a)(3), the definition of "recklessly".

12 See AS 11.81.900(a)(2), the definition of "knowingly".

13 See 1978 Senate Journal, Supp. No. 47 (June 12th), pp. 140-41.

14 *State v. ABC Towing*, 954 P.2d 575, 579 (Alaska App. 1998).

15 *Id.*

16 *Id.*

17 See *Trout v. State*, 866 P.2d 1323, 1324-25 (Alaska App. 1994).

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# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: H3 348  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title "An Act relating to violations of BRU Legal and Advocacy Services  
domestic violence protective orders " Component Public Defender Agency  
 Sponsor Rep. Croft  
 Requester (H) Judiciary Component No. 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

See attached.

Prepared by: Barbara Brink, Director  
 Division: Public Defender Agency  
 Approved by: Jim Duncan, Commissioner  
 Agency: Department of Administration

Phone (907) 334-4416  
 Date/Time 2/22/02 5:27 PM  
 Date 2/22/2002

**ANALYSIS CONTINUATION**

This legislation would amend the class A misdemeanor crime of violating a protective order to clarify the culpable mental state required for the defendant's degree of awareness that his or her conduct would violate the protective order. The statute, as written currently, is ambiguous as to that necessary culpable mental state. The Court of Appeals interpreted the statute in Strane v. State, 16 P.3d 745 (Alaska App. 2001) to require the culpable mental state of "knowingly" to apply both to the conduct and with respect to the circumstance that their conduct violated the protective order. This bill would require that the defendant act "with reckless disregard" that the act violates or would violate the protective order.

The Public Defender Agency does not anticipate that this bill would have a fiscal impact on it. The Agency is already appointed to cases of this nature and clarifying the culpable mental state in the statute should not significantly change that caseload.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 348  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
 Title "An Act relating to violations of domestic violence protective orders." BRU Criminal Division  
 Sponsor Representative Croft Component 1st-4th Judicial Districts; Criminal Appeals/Special Litigation  
 Requester House Judiciary Committee Component No. 2198-99;2201/03/61/79

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 AS 11.56.740(a) prohibits violating a domestic violence order. HB 348 specifies the mental state and requires the state prove that the defendant acted with reckless disregard that his or her conduct violated the order.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
 Division Attorney General's Office Date/Time 2/22/02 2:07 PM  
 Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 2/22/2002  
 Agency Department of Law

# ❖ The Legal Advocate ❖

Volume 5 Issue 1

July-September 2001

## Strane v. State

*Summary of case by Christine McLeod Pate*

*A case issued early this year by the Alaska Court of Appeals will make it harder to prosecute abusers for violations of protective orders.*

In Strane v. State the Court of Appeals was asked to construe AS 11.56.740(a), which makes it a crime for a person to "knowingly" commit or attempt to commit an act that violates one or more of seven restraining order provisions (no threatening, no contacting, stay away from residence, stay away from employment, stay away from propelled vehicle, no deadly weapon, and no firearms). At issue was the interpretation of the term "knowingly" which the court found was left ambiguous in the statute.

The state argued that "knowingly" required no mental state on the part of the defendant and that they should be found guilty even if they had no awareness that their actions would violate the law (similar to the theory that ignorance of the law is no excuse). The defendant argued that he could be found guilty only if he understood the provisions of the

protective order and knew that by his conduct, he was violating the order.

The Court held in this case that the correct mental state required for the statute is "knowingly" which it interpreted to mean - 1) that the state must prove that Strane knew that his conduct violated the order or, alternatively, 2) that Strane was aware of a substantial probability that his conduct violated the order, unless Strane actually believed that his conduct did not violate the order.

The State will now have to prove that the defendant knew that his conduct violated the protective order, or, at least, that the defendant was aware of a substantial probability that his conduct violated the order. An honest mistake, even if an unreasonable mistake, will be a good defense to the charge.

The opinion is long and arduous. Advocates with questions should contact the LAP or their local DA's office. ☪

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*Views expressed in this newsletter do not necessarily represent ANDVSA opinions*

INSTRUCTION NO. 18

As to Counts II and III, the state must prove beyond a reasonable doubt that the defendant knew that his conduct violated the domestic violence protective order or, alternatively, that the defendant was aware of a substantial probability that his conduct violated the order, unless the defendant actually believed his conduct did not violate the order. His belief that his conduct did not violate the order need not be objectively reasonable.

1.24.02

jury instructions from a  
recent case in FBX from  
Annie Carpenetti.

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA  
AT \_\_\_\_\_

\_\_\_\_\_  
Petitioner

DOB \_\_\_\_\_

v.

\_\_\_\_\_  
Respondent

DOB \_\_\_\_\_

CASE NO. \_\_\_\_\_

**DOMESTIC VIOLENCE  
PROTECTIVE ORDER**

A hearing on petitioner's request for a protective order was held on \_\_\_\_\_  
with  petitioner  respondent  guardian ad litem present.  
Tape # \_\_\_\_\_ Log # \_\_\_\_\_

Based on the petition and testimony presented at the hearing, the court makes the following findings and order:

**FINDINGS**

The court finds by a preponderance of evidence that:

1. The relationship between petitioner and respondent is that of:
  - a. persons who are current or former spouses.
  - b. persons who live together or who have lived together.
  - c. persons who are dating or who have dated.
  - d. persons who are engaged in or who have engaged in a sexual relationship.
  - e. persons who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law.
  - f. persons who are related or formerly related by marriage.
  - g. persons who have a child of the relationship
  - h. minor child and a person in a relationship described in a. through g. above with the minor child's parent, or the minor children of persons in a relationship described in a. through g. above.

[AS 18.66.990(5)]
2.  The respondent has committed a crime involving domestic violence against the petitioner. This is a civil finding based on a preponderance of the evidence and is not a criminal conviction. [AS 18.66.100(b) and 18.66.990(3)]
3.  The respondent has received actual notice of the hearing and been given an opportunity to be heard. [AS 18.66.100(b) and 18 USC 922(g)]
4. Respondent  does  does not represent a credible threat to the physical safety of petitioner or a minor child in the care of the petitioner. [18 USC 922(g)(8)(C)(1)]



g. respondent not possess or use controlled substances.  
[AS 18.66.100(c)(11) & (16)]

h. respondent pay \$ \_\_\_\_\_ per month for the support of the petitioner while this order is in effect, beginning on \_\_\_\_\_  
[AS 18.66.100(c)(12)]

i. respondent not use or possess a deadly weapon (including a firearm), based on the court's finding that the respondent was in the actual possession of or used a weapon during the commission of domestic violence.  
[AS 18.66.100(c)(6)]

j. respondent surrender any firearm owned or possessed by the respondent to \_\_\_\_\_ no later than \_\_\_\_\_, based on the court's finding that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence.  
[AS 18.66.100(c)(7)]

k. respondent reimburse petitioner or other specified party for expenses associated with the domestic violence (including medical expenses, counseling, shelter and repair or replacement of damaged property) as follows:

Pay to:	Type of Expense:	Amount:
_____	_____	_____
_____	_____	_____
_____	_____	_____

[AS 18.66.100(c)(13)]

l. respondent pay to \_\_\_\_\_ costs and fees incurred by the petitioner in bringing this action, in the amount of \$ \_\_\_\_\_  
[AS 18.66.100(c)(14)]

m. respondent enroll in and complete at respondent's expense

- the following program for the rehabilitation of perpetrators of domestic violence that meets the standards set by the Department of Corrections under AS 44.28.020(b): \_\_\_\_\_
- the following alcohol/substance abuse treatment program: \_\_\_\_\_

[AS 18.66.100(c)(15)]

n. respondent may return once to the residence located at \_\_\_\_\_ only with a police escort to pick up essential personal belongings, clothing, and \_\_\_\_\_

[AS 18.66.100(c)(16)]

o. respondent not sell or dispose of any personal property of the petitioner, any property jointly held, or any disputed property. [AS 18.66.100(c)(16)]

p. other \_\_\_\_\_



\*\*\*\* NOTICE TO RESPONDENT \*\*\*\*

Violation of this order may be a misdemeanor, punishable by up to one year of incarceration and up to a \$5000 fine. [AS 18.66.130(d)(1) & AS 11.56.740] If you violate this order, you can be arrested by a peace officer without a warrant. [AS 18.65.530 & AS 12.25.030(b)]

If you possess a firearm or ammunition while this order is in effect, you may be charged with a federal offense even if paragraphs 1(i) and 1(j) of this order do not prohibit you from possessing these items. [18 USC 922(g)]

If you are convicted of assault in the fourth degree committed in violation of this order, you will be sentenced to at least 20 days in jail. [AS 12.55.135(c)]

If you are ordered to have no contact with the petitioner or to stay away from the petitioner's residence, vehicle, or other place designated by the court, an invitation by the petitioner to have the prohibited contact or to be present at or enter the residence, vehicle, or other place does not in any way invalidate or nullify the order. [AS 18.66.130(d)(2)]

\*\*\*\* NOTICE TO BOTH PARTIES \*\*\*\*

While this protective order is in effect, both petitioner and respondent

1. must keep the court informed of a means of contacting you (address and phone) so the court can notify you should there be any further action in this case (ask for confidentiality if necessary); and
2. have a continuing duty to inform the court in writing of pending civil actions or domestic violence criminal actions involving either the petitioner or the respondent. [AS 18.66.150(b)]

WRIT OF ASSISTANCE

TO: Any Peace Officer, State of Alaska

You are commanded to use every lawful means to enforce the above order. You shall:

- escort and assist petitioner to obtain possession of the residence at \_\_\_\_\_ and remove respondent if necessary.
- escort and assist petitioner to safely obtain possession of the items listed in paragraph 1.f. of this order.
- assist respondent once to recover undisputed personal items, clothing or other property listed in paragraph 1.n. of this order. You shall notify the petitioner of the time and date you will accompany the respondent to the residence. The petitioner may be present. Any item the petitioner objects to respondent removing, you shall restrain the respondent from removing from the residence.
- assist \_\_\_\_\_ to obtain physical custody of the minor child(ren) named in paragraph 2.a. of this order from any other person. You may enter any location where you have probable cause to believe the child(ren) may be found.

You shall also: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**MODIFICATION**

Either party may ask the court to change or end this order. A form for making this request (form DV-135) is available at the court clerk's office.

**EFFECTIVE DATES**

Paragraph 1(a) of this order, which prohibits the respondent from committing or threatening to commit acts of domestic violence, stalking or harassment, will remain in effect indefinitely, until dissolved by court order.

All other provisions of this order and writ will be in effect for six months unless modified or dissolved earlier by court order.

This order will be served on the Respondent as follows:

- in court on this date       by first-class mail       by police

\_\_\_\_\_  
Effective Date and Time

\_\_\_\_\_  
Judge/Magistrate

\_\_\_\_\_  
Type or Print Name

In-Court Distribution on above date:

- Petitioner  
 Respondent

In-Court Clerk: \_\_\_\_\_

Other Distribution:

I certify that on \_\_\_\_\_ a copy of this order was given or mailed to:

- Petitioner  
 Respondent  
 Local police/AST at \_\_\_\_\_ for their records  
 Local police/AST at \_\_\_\_\_ to serve respondent  
 CSED if applicable (with child support order)

Clerk: \_\_\_\_\_

**HB**

**350**



22-LS1300\B  
Luckhaupt  
4/15/02

*Adopted  
4-17-02*

**CS FOR HOUSE BILL NO. 350(JUD)**

*public hearing  
closed*

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-SECOND LEGISLATURE - SECOND SESSION**

*JJ- manual  
w/ notes of writing  
out*

**BY THE HOUSE JUDICIARY COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVE MCGUIRE**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to murder, conspiracy, criminal mischief, and terroristic threatening;**  
2 **and providing for an effective date."**

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

4 **\* Section 1. AS 09.60.070(c) is amended to read:**

5 (c) In this section, "serious criminal offense" means the following offenses:

- 6 (1) murder in any degree;
- 7 (2) manslaughter;
- 8 (3) criminally negligent homicide;
- 9 (4) assault in any degree;
- 10 (5) kidnapping;
- 11 (6) sexual assault in any degree;
- 12 (7) sexual abuse of a minor in any degree;
- 13 (8) robbery in any degree;
- 14 (9) coercion;

- 1 (10) extortion;
- 2 (11) arson in any degree;
- 3 (12) burglary in any degree;
- 4 (13) criminal mischief in the first, second, [OR] third, or fourth
- 5 degree;
- 6 (14) driving while intoxicated or another crime resulting from the
- 7 operation of a motor vehicle, boat, or airplane when the offender is intoxicated;
- 8 (15) a crime involving domestic violence, as defined in AS 18.66.990.

9 \* Sec. 2. AS 11.31.120(i)(2) is amended to read:

- 10 (2) "serious felony offense" means an offense
- 11 (A) against the person under AS 11.41, punishable as an
- 12 unclassified or class A felony; [OR]
- 13 (B) involving controlled substances under AS 11.71,
- 14 punishable as an unclassified, class A, or class B felony;
- 15 (C) that is criminal mischief in the first degree under
- 16 AS 11.46.475; or
- 17 (D) that is terroristic threatening in the first degree under
- 18 AS 11.56.807.

19 \* Sec. 3. AS 11.41.100(a) is amended to read:

- 20 (a) A person commits the crime of murder in the first degree if
- 21 (1) with intent to cause the death of another person, the person
- 22 (A) causes the death of any person; or
- 23 (B) compels or induces any person to commit suicide through
- 24 duress or deception;
- 25 (2) the person knowingly engages in conduct directed toward a child
- 26 under the age of 16 and the person with criminal negligence inflicts serious physical
- 27 injury on the child by at least two separate acts, and one of the acts results in the death
- 28 of the child; [OR]
- 29 (3) acting alone or with one or more persons, the person commits or
- 30 attempts to commit a sexual offense against or kidnapping of a child under 16 years of
- 31 age and, in the course of or in furtherance of the offense or in immediate flight from

1 that offense, any person causes the death of the child; in this paragraph, "sexual  
2 offense" means an offense defined in AS 11.41.410 - 11.41.470;

3 (4) acting alone or with one or more persons, the person commits  
4 or attempts to commit criminal mischief in the first degree under AS 11.46.475  
5 and, in the course of or in furtherance of the offense or in immediate flight from  
6 that offense, any person causes the death of a person other than one of the  
7 participants; or

8 (5) acting alone or with one or more persons, the person commits  
9 terroristic threatening in the 1<sup>st</sup> degree under AS 11.56.807 and, in the course of  
10 or in furtherance of the offense or in immediate flight from that offense, any  
11 person causes the death of a person other than one of the participants.

12 \* Sec. 4. AS 11.41.260(a) is amended to read:

13 (a) A person commits the crime of stalking in the first degree if the person  
14 violates AS 11.41.270 and

15 (1) the actions constituting the offense are in violation of an order  
16 issued or filed under AS 18.66.100 - 18.66.180 or issued under former  
17 AS 25.35.010(b) or 25.35.020;

18 (2) the actions constituting the offense are in violation of a condition of  
19 probation, release before trial, release after conviction, or parole;

20 (3) the victim is under 16 years of age;

21 (4) at any time during the course of conduct constituting the offense,  
22 the defendant possessed a deadly weapon;

23 (5) the defendant has been previously convicted of a crime under this  
24 section, AS 11.41.270, or AS 11.56.740, or a law or ordinance of this or another  
25 jurisdiction with elements similar to a crime under this section, AS 11.41.270, or  
26 AS 11.56.740; or

27 (6) the defendant has been previously convicted of a crime, or an  
28 attempt or solicitation to commit a crime, under (A) AS 11.41.100 - 11.41.250,  
29 11.41.300 - 11.41.460, AS 11.56.807, 11.56.810 [AS 11.56.810], AS 11.61.120, or (B)  
30 a law or an ordinance of this or another jurisdiction with elements similar to a crime,  
31 or an attempt or solicitation to commit a crime, under AS 11.41.100 - 11.41.250,

1 11.41.300 - 11.41.460, AS 11.56.807, 11.56.810 [AS 11.56.810], or AS 11.61.120,  
2 involving the same victim as the present offense.

3 \* **Sec. 5.** AS 11.46 is amended by adding a new section to read:

4 **Sec. 11.46.475. Criminal mischief in the first degree.** (a) A person  
5 commits the crime of criminal mischief in the first degree if, having no right to do so  
6 or any reasonable ground to believe the person has such a right,

7 (1) the person intentionally damages an oil or gas pipeline or  
8 supporting facility;

9 (2) with intent to cause a substantial interruption or impairment of a  
10 service rendered to the public by a utility or by an organization that deals with  
11 emergencies involving danger to life or property, the person damages or tampers with  
12 property of that utility or organization and causes substantial interruption or  
13 impairment of service to the public;

14 (3) with intent to damage property of another by the use of widely  
15 dangerous means, the person damages property of another in an amount exceeding  
16 \$100,000 by the use of widely dangerous means.

17 (b) Criminal mischief in the first degree is a class A felony.

18 \* **Sec. 6.** AS 11.46.480(a) is amended to read:

19 (a) A person commits the crime of criminal mischief in the second [FIRST]  
20 degree if, having no right to do so or any reasonable ground to believe the person has  
21 such a right,

22 (1) [WITH INTENT TO CAUSE A SUBSTANTIAL  
23 INTERRUPTION OR IMPAIRMENT OF A SERVICE RENDERED TO THE  
24 PUBLIC BY A UTILITY OR BY AN ORGANIZATION WHICH DEALS WITH  
25 EMERGENCIES INVOLVING DANGER TO LIFE OR PROPERTY, THE PERSON  
26 DAMAGES OR TAMPERS WITH PROPERTY OF THAT UTILITY OR  
27 ORGANIZATION AND CAUSES SUBSTANTIAL INTERRUPTION OR  
28 IMPAIRMENT OF SERVICE TO THE PUBLIC;

29 (2) WITH INTENT TO DAMAGE PROPERTY OF ANOTHER BY  
30 THE USE OF WIDELY DANGEROUS MEANS, THE PERSON DAMAGES  
31 PROPERTY OF ANOTHER IN AN AMOUNT EXCEEDING \$100,000 BY THE

## 1 USE OF WIDELY DANGEROUS MEANS;

2 (3)] the person tampers with [INTENTIONALLY DAMAGES] an oil  
3 or gas pipeline or supporting facility or an airplane or helicopter, with reckless  
4 disregard for the risk of harm to or loss of the property; or

5 (2) [(4)] with intent to cause physical injury to another person, the  
6 person [:]

7 (A) tampers with food, air, water, or an item that is a [FOOD,]  
8 drug [,] or cosmetic, or a container for food, air, water, or the item; or

9 (B) delivers, dispenses, or distributes food, air, water, or an  
10 item described in (A) of this paragraph knowing that a person has tampered  
11 with the food, air, water, or item or a container for the food, air, water, or  
12 item.

13 \* Sec. 7. AS 11.46.480(b) is amended to read:

14 (b) Criminal mischief in the second [FIRST] degree is a class B felony.

15 \* Sec. 8. AS 11.46.480(c) is amended to read:

16 (c) In (a)(2) [(a)(4)] of this section,

17 (1) "deliver" means the actual, constructive, or attempted transfer from  
18 one person to another of food, air, water, or an item;

19 (2) "dispense" means to deliver a drug to an ultimate user or research  
20 subject by or under the lawful order of a practitioner, including the prescribing,  
21 administering, packaging, labeling, or compounding necessary to prepare the drug for  
22 that delivery;

23 (3) "distribute" means to deliver food, air, water, or an item, whether  
24 or not there is any money or other item of value exchanged; it includes sale, gift, or  
25 exchange;

26 (4) "drug" has the meaning given in AS 11.71.900(9);

27 (5) "tamper" means to interfere with something improperly, meddle  
28 with it, or make unwarranted alterations to its existing condition.

29 \* Sec. 9. AS 11.46.482(a) is amended to read:

30 (a) A person commits the crime of criminal mischief in the third [SECOND]  
31 degree if, having no right to do so or any reasonable ground to believe the person has

1 such a right,

2 (1) with intent to damage property of another, the person damages  
3 property of another in an amount of \$500 or more;

4 (2) [THE PERSON TAMPERS WITH AN OIL OR GAS PIPELINE  
5 OR SUPPORTING FACILITY OR AN AIRPLANE OR HELICOPTER WITH  
6 RECKLESS DISREGARD FOR THE RISK OF HARM TO OR LOSS OF THE  
7 PROPERTY;

8 (3)] the person recklessly creates a risk of damage in an amount  
9 exceeding \$100,000 to property of another by the use of widely dangerous means; or

10 (3) [(4) REPEALED

11 (5) REPEALED

12 (6)] the person knowingly

13 (A) defaces, damages, or desecrates a cemetery or the contents  
14 of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,  
15 grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or  
16 memorial appears to be abandoned, lost, or neglected;

17 (B) removes human remains or associated burial artifacts from  
18 a cemetery, tomb, grave, or memorial regardless of whether the cemetery,  
19 tomb, grave, or memorial appears to be abandoned, lost, or neglected.

20 \* Sec. 10. AS 11.46.482(b) is amended to read:

21 (b) It is an affirmative defense to a prosecution under (a)(3) [(a)(6)] of this  
22 section that the defendant, at the time of the offense, was

23 (1) an employee of the cemetery and was engaged in an authorized  
24 activity on behalf of the cemetery; or

25 (2) authorized by law or state permit to engage in the conduct.

26 \* Sec. 11. AS 11.46.482(d) is amended to read:

27 (d) Criminal mischief in the third [SECOND] degree is a class C felony.

28 \* Sec. 12. AS 11.46.484(a) is amended to read:

29 **Sec. 11.46.484. Criminal mischief in the fourth [THIRD] degree.** (a) A  
30 person commits the crime of criminal mischief in the fourth [THIRD] degree if,  
31 having no right to do so or any reasonable ground to believe the person has such a

1 right

2 (1) with intent to damage property of another, the person damages  
3 property of another in an amount of \$50 or more but less than \$500;

4 (2) [REPEALED

5 (3) REPEALED

6 (4)] the person tampers with a fire protection device in a building that  
7 is a public place;

8 (3) [(5)] the person knowingly accesses a computer, computer system,  
9 computer program, computer network, or part of a computer system or network;

10 (4) [(6)] the person uses a device to descramble an electronic signal  
11 that has been scrambled to prevent unauthorized receipt or viewing of the signal unless  
12 the device is used only to descramble signals received directly from a satellite or  
13 unless the person owned the device before September 18, 1984; or

14 (5) [(7)] the person knowingly removes, relocates, defaces, alters,  
15 obscures, shoots at, destroys, or otherwise tampers with an official traffic control  
16 device or damages the work upon a highway under construction.

17 \* Sec. 13. AS 11.46.484(b) is amended to read:

18 (b) Criminal mischief in the fourth [THIRD] degree is a class A  
19 misdemeanor.

20 \* Sec. 14. AS 11.46.486 is amended to read:

21 **Sec. 11.46.486. Criminal mischief in the fifth [FOURTH] degree.** (a) A  
22 person commits the crime of criminal mischief in the fifth [FOURTH] degree if,  
23 having no right to do so or any reasonable ground to believe the person has such a  
24 right,

25 (1) with reckless disregard for the risk of harm to or loss of the  
26 property or with intent to cause substantial inconvenience to another, the person  
27 tampers with property of another;

28 (2) with intent to damage property of another, the person damages  
29 property of another in an amount less than \$50; or

30 (3) the person rides in a propelled vehicle knowing it has been stolen  
31 or that it is being used in violation of AS 11.46.360 or 11.46.365(a)(1).

1 (b) Criminal mischief in the fifth [FOURTH] degree is a class B  
2 misdemeanor.

3 \* Sec. 15. AS 11.46.487 is amended to read:

4 **Sec. 11.46.487. Forfeiture of property upon conviction.** Firearms and other  
5 personal property, except a motor vehicle, used in aid of a violation of AS 11.46.460,  
6 11.46.462, or 11.46.484(a)(5) [11.46.484(a)(7)] may be forfeited to the state upon  
7 conviction of the offender for the crime.

8 \* Sec. 16. AS 11.56.800(a) is amended to read:

9 (a) A person commits the crime of false information or report if the person  
10 knowingly

11 (1) gives false information to a peace officer

12 (A) with the intent of implicating another in an offense; or

13 (B) concerning the person's identity while the person is

14 (i) under arrest, detention, or investigation for a crime;

15 or

16 (ii) being served with an arrest warrant or being issued a

17 citation;

18 (2) makes a false report to a peace officer that a crime has occurred or  
19 is about to occur;

20 (3) makes a false report or gives a false alarm, under circumstances  
21 not amounting to terroristic threatening in the second degree under  
22 AS 11.56.810, that a fire or other incident dangerous to life or property calling for an  
23 emergency response has occurred or is about to occur; or

24 (4) makes a false report to the Department of Natural Resources under  
25 AS 46.17 concerning the condition of a dam or reservoir.

26 \* Sec. 17. AS 11.56 is amended by adding a new section to read:

27 **Sec. 11.56.807. Terroristic threatening in the first degree.** (a) A person  
28 commits the crime of terroristic threatening in the first degree if the person sends,  
29 delivers, or attempts to send or deliver a package or any other item containing a  
30 biological or chemical substance or an imitation biological or chemical substance with  
31 intent to

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- (1) place a person in fear of physical injury to any person;
- (2) cause evacuation of a building, public place or area, business premises, or mode of public transportation; or
- (3) cause serious public inconvenience.

(b) In this section,

- (1) "biological or chemical substance" means a material that is harmful to the health of a person;
- (2) "imitation biological or chemical substance" means a material that by its appearance would lead a reasonable person to believe that it is harmful to the health of a person.

(c) Terroristic threatening in the first degree is a class B felony.

\* Sec. 18. AS 11.56.810 is amended to read:

**Sec. 11.56.810. Terroristic threatening in the second degree.** (a) A person commits the crime of terroristic threatening in the second degree if the person knowingly makes a false report that a circumstance

(1) dangerous to human life exists or is about to exist and

(A) [(1) PLACES] a person is placed in reasonable fear of physical injury to any person;

(B) [(2)] causes evacuation of a building, public place or area, business premises, or mode of public transportation; [OR]

(C) [(3)] causes serious public inconvenience;

(D) the report claims that a biological or chemical substance that is harmful to the health of a person has been sent or is present in a building, public place or area, business premises, or mode of public transportation; or

(E) substantially disrupts the schedule of an entity providing transportation services for persons or property; or

(2) exists or is about to exist that is dangerous to the proper or safe functioning of an oil or gas pipeline or supporting facility, utility, or transportation or cargo facility; in this paragraph, "oil or gas pipeline and supporting facility" and "utility" have the meanings given in AS 11.46.490.

*drafts*  
*corrected*  
*Revised*  
*Amend #1*  
*Km - W*  
*JS - W*  
*SC - W*  
*rvj - W*  
*CS - Y*

L

1 (b) Terrorist threatening in the second degree is a class C felony.

2 \* **Sec. 19.** AS 12.61.120(b) is amended to read:

3 (b) If the defendant is proceeding without counsel in a case involving a  
4 charged violation of AS 11.41, AS 11.46.300 - 11.46.330, AS 11.56.740, 11.56.807,  
5 11.56.810, AS 11.61.190 - 11.61.210, or a crime involving domestic violence [,] and  
6 the court finds that the defendant may pose a continuing threat to the victim of or  
7 witness to the offense charged, the court shall protect the address and telephone  
8 number of the victim or witness by providing the information only to a person  
9 specified by the court or by imposing other restrictions that the court considers  
10 necessary. When an address or telephone number is released to a person specified by  
11 the court under this subsection, that person, who shall be ordered not to disclose the  
12 information to the defendant, shall contact the victim or witness on behalf of the  
13 defendant, and the defendant shall meet or speak with the victim or witness only in the  
14 presence of that person.

15 \* **Sec. 20.** AS 18.66.990(3) is amended to read:

16 (3) "domestic violence" and "crime involving domestic violence" mean  
17 one or more of the following offenses or an offense under a law or ordinance of  
18 another jurisdiction having elements similar to these offenses, or an attempt to commit  
19 the offense, by a household member against another household member:

20 (A) a crime against the person under AS 11.41;

21 (B) burglary under AS 11.46.300 - 11.46.310;

22 (C) criminal trespass under AS 11.46.320 - 11.46.330;

23 (D) arson or criminally negligent burning under AS 11.46.400 -  
24 11.46.430;

25 (E) criminal mischief under AS 11.46.475 - 11.46.486  
26 [AS 11.46.480 - 11.46.486];

27 (F) terrorist threatening under AS 11.56.807 or 11.56.810  
28 [AS 11.56.810];

29 (G) violating a domestic violence order under AS 11.56.740; or

30 (H) harassment under AS 11.61.120(a)(2) - (4);

31 \* **Sec. 21.** The uncoded law of the State of Alaska is amended by adding a new section to

1 read:

2           APPLICABILITY. This Act applied to offenses committed on or after the effective  
3 date of this Act.

4       \* **Sec. 22.** This Act takes effect immediately under AS 01.10.070(c).

# ALASKA STATE LEGISLATURE

Session  
State Capitol, Room 418  
Juneau, AK 99801-1182  
(907) 465-2995 fax: 465-6592



Interim  
716 W. 4<sup>th</sup> Ave. Suite 430  
Anchorage, AK 99501  
(907) 269-0250 fax: 269-0249

## Representative Lesil McGuire District 17

### Sponsor Statement CS for House Bill 350

#### **"An Act relating to terroristic threatening"**

Since September 11, 2001, what was once considered only a concern for those living, working or visiting overseas locations has painfully come home. September 11<sup>th</sup> changed our world and the way we will be expected to conduct ourselves in public from now on. Today when we board a plane, we scrutinize others around us more closely and have been encouraged to take matters into our own hands should someone try to commit a terroristic action.

We have also seen changes in how we prepare to board public transportation, as security has tightened. The event of that day in September has altered how we live our day-to-day lives. For many it is frustrating to stand in long lines and undergo questioning, but it does not give us the right to threaten airport personnel simply trying to do their jobs, or to instill fear in the minds of fellow passengers.

In a recent incident in Sitka, an Alaska Airlines employee was doing her job in security. An individual threatened to leave the airport and return as an assassin if he was not permitted to pass through. The diligent employee contacted local authorities and the individual was detained and later released.

Likewise, we have been warned of the dangers associated with terrorism. The CS in House Bill 350 adds to the bill, threats to our water and food supplies, utilities and pipelines. House Bill 350 will provide law enforcement the necessary tools to arrest, detain and ultimately prosecute an individual who threatens public areas or conveyances.

A threat in this day and age must be taken seriously. House Bill 350 will make sure that if an individual threatens an airport or one of its employees with harm, that they will be punished in accordance with the law.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 350(TRA)  
 (H) Publish Date: 2/20/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Terroristic threatening BRU Alaska Court System  
 Component Trial Courts  
 Sponsor Representative McGuire  
 Requester Representative McGuire Component No. 768

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 350.

Prepared by: Douglas Wooliver Phone 463-4750  
 Division Alaska Court System Date/Time 2/20/02 9:28 AM  
 Approved by: Stephanie Cole Date 2/20/02  
 Agency Alaska Court System

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: CSHB 350(TRA)  
 (H) Publish Date: 2/20/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title: "An Act relating to terroristC  
threatening..." BRU: Legal and Advocacy Services  
 Component: Public Defender Agency  
 Sponsor: Rep. McGuire  
 Requester: (H) TRA Component No. 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 See attached.

Prepared by: Barbara Brink, Director Phone (907) 334-4416  
 Division: Public Defender Agency Date/Time 2/19/02 8:28 AM  
 Approved by: Jim Duncan Date 2/19/2002  
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

BILL NO. CSHB 350(TRA) - FN#2

**ANALYSIS CONTINUATION**

This legislation would amend the crime of terroristic threatening (a class C felony) to include when a person knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist that disrupts the schedule of a public transportation service or causes evacuation of a public area or public conveyance. More troubling is the provision of the bill that proposes to include in the same crime when a person knowingly threatens a person engaged in providing transportation services or support services with physical injury regardless of whether the person making the threat had the ability or intent to carry out the threat and the person threatened actually was placed in fear of physical injury. If this bill, as broadly written as it is, became law, it would likely have a significant fiscal impact on the Public Defender Agency. It is not possible to determine the extent of that impact, however, because it is unknown how many potential cases would result from this broadly written proscriptive language. The Public Defender Agency has serious concerns about broadening the language in the terroristic threatening statute to include personal threats that might not have any real terroristic qualities. Since the Agency cannot predict how many more cases would result if this proposed legislation passed, an indeterminate fiscal note is submitted.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 3  
 Bill Version: CSHB 350(TRA)  
 (H) Publish Date: 2/20/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
 Title "An Act relating to terroristic threatening." BRU Criminal Division  
 Component 1st-4th Judicial Districts; Criminal  
 Appeals/Special Litigation  
 Sponsor Representative McGuire  
 Requester House Transportation Committee Component No. 2198-99;2201-03;61;79

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*****	*****	*****	*****	*****	*****

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

HB 350 would expand the actions that could lead to a charge of terroristic threatening, a class C felony. Specifically, if an individual causes the evacuation of a public area, public conveyance, or building; disrupts the schedule of a public transportation entity; or threatens, even jokingly, a transportation service provider or transportation support services provider with physical injury, even if the person threatened was not placed in fear of physical injury, that individual could be charged with this crime.

The language in subsection (2) regarding threats to persons actually providing transportation services or support services would cover a very large variety of situations not currently considered felonies. Felony prosecutions are costly, but the Department of Law has no way of estimating how many new cases might be referred for prosecution if this bill becomes law, and cannot assign a potential fiscal impact.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
 Division Attorney General's Office Date/Time 2/19/02 8:27 AM  
 Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General Date 2/19/2002  
 Agency Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: CSHB 350(TRA)  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title "An Act relating to criminal mischief  
and terroristic threatening..." BRU Legal and Advocacy Services  
 Component Public Defender Agency  
 Sponsor Rep. McGuire  
 Requester (H) Judiciary Component No. 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 See attached.

Prepared by: Barbara Brink, Director Phone (907) 334-4416  
 Division Public Defender Agency Date/Time 2/21/02 1:29 PM  
 Approved by: Jim Duncan, Commissioner Date 2/21/2002  
 Agency Department of Administration

FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

BILL NO. CSHB 350

**ANALYSIS CONTINUATION**

This legislation would amend the crime of criminal mischief in the first degree (class B felony) to include tampering with a water supply with intent to cause physical injury. The crime currently prohibits tampering with other items with intent to cause physical injury (food, drugs, cosmetics). The bill also proposes to amend the crime of terroristic threatening (a class C felony) to include when a person knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist that disrupts the schedule of a public transportation service or causes evacuation of a public area or public conveyance, or a false report that a circumstance exist or is about to exist that is dangerous to the safe functioning of an oil or gas pipeline or supporting facility, utility, or transportation or cargo facility.

The last provision in Section 2, subsection (a)(2) would likely have a fiscal impact on the Public Defender Agency. This subsection may cover a sizeable variety of situations not currently covered as felonies. It is not possible to determine the extent of that impact, however, because it is unknown how many potential cases would result from this broadly written proscriptive language. Since the Agency cannot predict how many more felony cases would result if this proposed legislation passed, an indeterminate fiscal note is submitted.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: CSHB 350 (TRAN)  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Corrections  
 Title An Act relating to terroristic threatenin BRU Administration and Operations  
 Component All  
 Sponsor Rep. McGuire  
 Requester House Judiciary Committee Component No. 694

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>

Estimate of any current year (FY2002) cost: 0 0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*  
 This legislation expands the circumstances under which someone can be charged with Terroristic Threatening, a felony. This bill will add a provision to include knowingly making a false report that a circumstance dangerous to human life exists or is about to exist and causes evacuation of a public area, mode of public transportation or building or disrupts the schedule of an entity providing transportation services for persons or property. It additionally will include false reports of a circumstance exists or is about to exist regarding the safe or proper functioning of oil or gas pipeline or supporting facility, etc. Any addition of circumstances expanding felony prosecution will likely have a fiscal impact on the Department of Corrections. It is anticipated that the number of cases that apply in this legislation will be minimal, therefore, the Dept. of Corrections is submitting an indeterminate fiscal note.

Prepared by: Candace Brower Phone 465-4652  
 Division Commissioner's Office Date/Time 2/26/02 4:53 PM  
 Approved by: Margaret Pugh, Commissioner Date 2/26/02  
 Agency Dept. of Corrections

**Sec. 11.56.810. Terroristic threatening.**

(a) A person commits the crime of terroristic threatening if the person knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist and

- (1) places a person in fear of physical injury to any person;
- (2) causes evacuation of a building; or
- (3) causes serious public inconvenience.

(b) Terroristic threatening is a class C felony.

(§ 6 ch 166 SLA 1978; am § 1 ch 108 SLA 1984 am § 4 ch 40 SLA 1993)

**Effect of amendments.** The 1993 amendment, effective May 28, 1993, rewrote subsection (a).

**NOTES TO DECISIONS**

**Constitutionality.** - This section does not constitute an impermissibly broad restriction of protected speech. *Allen v. State*, 759 P.2d 541 (Alaska Ct. App. 1988).

This section is not impermissibly vague when the word "repeated" in the statute is accorded its ordinary meaning. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

**Focus on intent of accused.** - The statutory definition of terroristic threatening hinges the offense on the specific intent of the accused rather than on the subjective reaction of the victim. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

**Provoking accused.** - No defense arises under the statutory definition of the offense merely because the accused is in some manner provoked to threaten the victim. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

**Repeated threats.** - The obvious purpose in requiring that a threat be "repeated" before becoming a terroristic threat is to assure that the harsh sanction of felony prosecution will not be visited upon a person for making a rash statement out of transitory anger or in the heat of passion. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

There was ample evidence to permit a finding that defendant made "repeated threats" to take his wife's life, where the threats were not made in a continuous manner but were repeated over a period of more than fifteen minutes. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

**Attempted coercion is not a lesser included offense** of terroristic threatening. *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988).

**Voice spectrographic analysis.** - Trial court did not err in admitting opinion evidence, based on a voice spectrographic analysis, that defendant made terroristic telephone calls of which he was accused. *State v. Coon*, 974 P.2d 386 (Alaska 1999).

**Sentence held excessive.** - Sentence of four years, with one year suspended, for terroristic bombing was excessive, where the aggravating factors of deliberate cruelty and prior repeated instances of assaultive behavior were not supported by the record. *Allen v. State*, 759 P.2d 541 (Alaska Ct. App. 1988).

**Collateral references.** Criminal offense of bomb hoax or making false report as to planting of explosive, 93 ALR2d 304.

Possession of bomb, Molotov cocktail, or similar device as criminal offense, 42 ALR3d 1230.

Validity and construction of "terroristic threat" statutes, 45 ALR4th 949.

Imposition of state or local penalties for threatening to use explosive devices at schools or other buildings. 79 ALR5th 1.

THE  
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# State frees man held for making threats

■ **ARREST:** Alaska Airlines bans Washington man from flights after he became angry over late luggage.

The Associated Press

SITKA — The state decided Friday not to prosecute a 58-year-old Washington man who was arrested at the Sitka airport after allegedly threatening an airline worker.

But Alaska Airlines has banned Dr. Bruce Stevenson from its flights for life because of Thursday's incident.

Stevenson apparently became upset about possible delays in retrieving baggage, police said. Lt. John Baeza said Stevenson told the Alaska Airlines ticket agent, "If I don't get my bag I'm coming back here as an assassin."

"He said it seriously, with no hint of a smile or that he was joking, and all the witnesses took it very seriously," Baeza said.

Sitka Police Chief Bill McLendon criticized the state's refusal to take the Woodinville, Wash., medical doctor to court.

"The decision reeks of favoritism and documents a steady history of political maneuvering and ineptness in handling cases," McLendon said Friday. "To say we have no confidence in (prosecutors') abilities would be a gross understatement."

Earlier Friday, assistant district attorney Corinne Vorenkamp told the Daily Sentinel in Sitka that the state did not have enough evidence for a criminal prosecution against Stevenson, a doctor at the prestigious Virginia Mason Hospital in Seattle.

"While there's certainly no accounting for the exceedingly poor taste and bad judgment of essentially ignoring a national tragedy, the state has decided to not file a complaint," Vorenkamp said.

Responding to a call from the airport Thursday afternoon, Sitka police arrested Stevenson on a felony charge of terroristic threatening and a misdemeanor charge of fourth-degree assault.

Stevenson was held overnight in the Sitka jail without bail and was released Friday after the charges were dropped.

In Anchorage, assistant U.S. attorney Stephan Collins said the federal government does not have jurisdiction in the case.

"The threat wasn't made by telephone or by wire, and it wasn't made in the air," Collins said. "If the plane were in the air at the time, we'd have jurisdiction -- maritime, or territorial -- but on the ground, in the airport, to a tick-



JAMES POULSON / The Associated Press

Sitka Police Lt. John Baeza, left, stands by as Dr. Bruce Stevenson, 58, background center, is placed in a patrol car following his arrest for allegedly threatening an airline worker at the airport in Sitka. Police say that Stevenson, a doctor at Virginia Mason Hospital in Seattle, apparently told the Alaska Airlines ticket agent, "If I don't get my bag I'm coming back here as an assassin."

et agent, from what details I understand about this case we don't have jurisdiction. That would be up to the state."

Vorenkamp said that to be prosecuted for terroristic threatening under state law, a person would have to "knowingly make a false report that a circumstance dangerous to human life exists or is about to exist."

"What Mr. Stevenson said certainly was insensitive to the fears of the person to whom he said it, and it's appalling in light of the national tragedy that happened this week," she said, "but under state law it is not a crime."

However, Stevenson will never be allowed onboard an Alaska Airlines flight again, company spokesman Greg Witter said from the airline's Seattle headquarters.

"We have a zero-tolerance policy for anyone who tries to abuse or threaten our employees in any way, shape or manner," he said.

# Doctor sorry for making threat to airline agent

■ **APOLOGY:** He admits he 'demonstrated a terrible lack of judgment.'

The Associated Press

SITKA — The Washington state doctor who was arrested in Sitka for making threatening comments to an Alaska Airlines ticket agent apologized Tuesday for his actions.

Dr. Bruce Stevenson was arrested at the Sitka airport Thursday, when commercial flights were allowed to resume after the terrorist attacks on the East Coast. The state, however, decided not to prosecute, though Alaska Airlines has banned the 58-year-old doctor from its planes for life.

In last week's incident, Stevenson became upset about possible delays in retrieving baggage and re-

portedly told the ticket agent he would "come back as an assassin" if that occurred.

Stevenson, a doctor at Virginia Mason Hospital in Seattle, issued a prepared statement Tuesday, saying he is sorry for the stress his comments caused.

Stevenson has been placed on indefinite administrative leave because of the incident, said hospital spokeswoman Linda Stepanich. The hospital faxed the doctor's comments to the Daily Sentinel in Sitka.

In the statement, Stevenson wrote: "I made an inappropriate remark that was interpreted as a threat.

"I demonstrated a terrible lack of judgment and I sincerely apologize for my actions. As a frequent traveler to Alaska, I have built many warm

See Page B-2 DOCTOR

## DOCTOR: *He's sorry*


Continued from B-1

relationships over the years. I genuinely regret jeopardizing the goodwill of the many friends and colleagues I have in your fine state.

"I am very sorry that this incident added to the stress of airline, airport and public officials during this difficult time."

Police had charged the doctor with felony terroristic threatening and misdemeanor fourth-degree assault. Stevenson spent a night in the Sitka jail before charges were dropped Friday after the state decided not to prosecute.

Stevenson left Sitka Friday.

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 E-Mail to a Friend

## KTVA.COM

### Alaska Airlines passenger arrested for terrorist threatening

*September 24, 2001*

An Alaska Airlines passenger who had lost a bag joked with an employee at the Juneau Airport that it contained a bomb. But the airline took it seriously, and the man was arrested Monday morning at his hotel room.

Twenty-nine-year-old James Longcroft was taken into custody at about 7 a.m. and charged with felony terroristic threatening. He was lodged at the Lemon Creek Correctional Center.

Longcroft, an Irish national who gave his residence as England, lost a bag on his flight in last night.

Juneau Police say that while he was describing the bag to an employee, he noted it had a bomb in it. He told the airline employee he was kidding.

But the employee contacted police, who then contacted the FBI, the Juneau District Attorney's Office and Juneau Airport Security and Alaska Airlines Dispatch Operations in Seattle.

The missing luggage had been located at the Seattle airport. Seattle police searched the bag and found no bomb.

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 Print this Article

 E-Mail to a Friend

## KTVA.COM

### Bomb threat shuts down Ketchikan airport

*December 30, 2001*

Authorities are investigating an anonymous bomb threat that shut down the Ketchikan International Airport for more than an hour Friday.

The airport was evacuated while airport police and troopers checked the premises. No explosives were found.

Airport manager David Allen says the threat was called in to Ketchikan police about 1:30 p-m. He says police then notified the airport, prompting the evacuation. Allen says he's not sure how many people were affected.

Allen says a jet was not due to land until a few hours later, so the building was relatively empty other than airport workers. He says people were allowed back in the building at about 2:45 p-m.

Alaska State Troopers say they are investigating the threat. Police are looking into the origin of the call, but Deputy Chief David Guzman says that's the department's only involvement.

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STATE OFFICE  
**ALASKA PEACE OFFICERS ASSOCIATION**

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



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Wrangell  
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March 29, 2002

Representative Lesil McGuire  
State Capitol  
Juneau, AK 99801-1182

Dear Representative McGuire:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing House Bill 350 relating to terroristic threatening.

The Alaska Peace Officers Association fully supports HB 350. This will enhance police and prosecutor efforts to hold persons accountable for threatening public areas or conveyances, and causing disruption to public transportation due to threatening behavior. The world we live in has changed and law enforcement must respond to all threats against public facilities in a serious manner. This legislation will help facilitate the investigation and prosecution of these crimes.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo Brandlen  
State President

**HB**

**362**



# ALASKA STATE LEGISLATURE

*Chair:*  
LABOR AND COMMERCE

*Member:*  
MILITARY AND VETERANS AFFAIRS  
COMMUNITY AND REGIONAL AFFAIRS  
LEGISLATIVE COUNCIL  
JOINT ARMED SERVICES




**REPRESENTATIVE LISA MURKOWSKI**  
Government Hill • Elmendorf • East Anchorage

*Session:*  
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JUNEAU, AK 99801-1182  
PHONE: (907) 465-3783  
FAX: (907) 465-2293  
Representative\_Lisa\_Murkowski@legis.state.ak.us

*Interim:*  
716 WEST 4TH AVENUE  
ANCHORAGE, AK 99501-2133  
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## Memorandum

**Date:** January 29, 2002  
**To:** Representative Norman Rokeberg  
Judiciary Chair  
**From:** Representative Lisa Murkowski   
**Subject:** Hearing Request

---

The Board of Governors of the Alaska Bar Association is scheduled to terminate June 30, 2002 and will have one year to conclude its administrative operations if the legislature does not act this session. House Bill 362 acknowledges that the Alaska Bar Association contributes greatly to the protection of the public's welfare and operates in a competent and professional manner. As recommended by the Division of Legislative Audit, House Bill 362 extends the termination date of the Bar Association for another four years.

Enclosed you will find a current copy of House Bill 362, the audit report, and a sponsor statement. Please schedule the bill at your earliest convenience. Please also make available teleconferencing from Anchorage and any other sites wishing to participate. I will contact you with off-site names and numbers when they are made available to me. Thank you for your prompt consideration.

# ALASKA STATE LEGISLATURE

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LABOR AND COMMERCE

*Member:*  
MILITARY AND VETERANS AFFAIRS  
COMMUNITY AND REGIONAL AFFAIRS  
LEGISLATIVE COUNCIL  
JOINT ARMED SERVICES



**REPRESENTATIVE LISA MURKOWSKI**  
Government Hill • Elmendorf • East Anchorage

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## Sponsor Statement HB 362

### Extend Board of Governors of Alaska Bar Association

The Board of Governors of the Alaska Bar Association was established in 1955 to ensure that only qualified members of the legal profession of good moral character are allowed to practice law in the state. The Bar Association's primary functions are to screen applicants for admission to ensure that all successful applicants are fit to practice law, and to provide discipline by investigating grievances against members of the Bar. The Bar Association also performs a wide variety of miscellaneous functions including classes for continuing legal education, lawyer referral services, and fee arbitration.

The board consists of twelve members, nine attorneys elected by the active membership of the Alaska Bar Association, and three non-attorney public members appointed by the governor and confirmed by a joint session of the legislature. The Bar Association currently regulates 2,719 licensed attorneys.

The Division of Legislative Audit, in its 2001 report, found that the Bar Association meets the public need in an effective and economical manner. It not only ensures that persons licensed to practice law are qualified, but provides for investigations of complaints and has established a disciplinary process designed to ensure that licensed individuals act in a competent and professional manner.

The Board of Governors of the Alaska Bar Association is scheduled to terminate June 30, 2002, and will have one year to conclude its administrative operations unless the legislature acts this session. House Bill 362 reflects the recommendation of the Division of Legislative Audit and extends the termination date for the Bar Association for another four years.

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

BILL NO. HB 362

Revision Date/Time (Note if correction) \_\_\_\_\_ Dept. Affected \_\_\_\_\_  
 Title Extend Board of Governors of Ak. Bar BRU Alaska Court System  
 Component Trial Courts

Sponsor Representative Murkowski  
 Requester House Judiciary Component No. 768

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

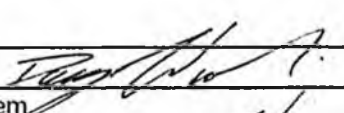
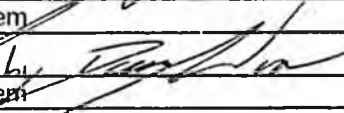
FUND SOURCE	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

**POSITIONS**

POSITIONS	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*  
 The Alaska Court System does not anticipate any fiscal impact from the passage of HB 362.

Prepared by: Douglas Wooliver  Phone 463-4750  
 Division Alaska Court System Date/Time 1/30/02 2:00 PM  
 Approved by: Stephanie Cole  Date 1/30/02  
 Agency Alaska Court System

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## Alaska Division of Legislative Audit

### Audit Digest #41-20008-02

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\* Requires Acrobat Reader



**SUMMARY OF:** A Sunset review of the Board of Governors of the Alaska Bar Association, November 30, 2001.

#### PURPOSE OF THE REPORT

In accordance with Title 24 and Title 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Board of Governors of the Alaska Bar Association. The purpose of this audit was to determine if there is a demonstrated public need for the continued existence of this board and if it has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during the legislative oversight hearings to determine whether the Board of Governors of the Alaska Bar Association should be reestablished. The law currently specifies that the board will terminate on June 30, 2002.

#### REPORT CONCLUSIONS

The Bar Association, through the Supreme Court, protects the public by ensuring that persons licensed to practice law are qualified. It also provides for the investigation of complaints and has established a discipline process designed to ensure that those licensed act in a competent and professional manner. As such, we recommend that the legislature extend the termination date of the board to June 30, 2006.

In general, it is our opinion that the board meets the public need in an effective and economical manner. However, we have made recommendations that, if implemented, will improve the efficiency and effectiveness of the board's operations.

#### FINDINGS AND RECOMMENDATIONS

In our report *Board of Governors of the Alaska Bar Association, January 2, 1998*, we made recommendations in the areas of lawyer referral services, continuing legal education, and attorney disclosure. Concerns regarding attorney disclosure have been adequately addressed.

Our recommendation on lawyer referral services has not been fully implemented and is restated in this report as Recommendation No. 1.

We also suggested that the board recommend to the Supreme Court that mandatory continuing legal education (CLE) requirements for attorneys be adopted. In response, the Supreme Court adopted a voluntary, rather than mandatory, CLE program. It adopted a three-year pilot program to determine if modest reductions in licensing fees would satisfactorily encourage attorneys to earn 12 credit hours of CLE

each year. This pilot program is set to end in 2002. We will review the program's results and the 12-hour guideline during the next sunset audit.

1. The Board of Governors of the Alaska Bar Association should establish screening and oversight procedures for attorneys wishing to participate in the Lawyer Referral Service.
2. The Alaska Bar Association's executive director should ensure that the public is appropriately notified of board meetings.



\* Requires Acrobat Reader 

November 30, 2001

Members of the Legislative Budget  
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

BOARD OF GOVERNORS OF THE  
ALASKA BAR ASSOCIATION  
SUNSET REVIEW

November 30, 2001

Audit Control Number

41-20008-02

This audit was conducted as required by AS 44.66.050 and under the authority of AS 24.20.271(1). Alaska Statute 44.66.050(c) lists criteria to be used to assess the demonstrated public need for a given board, commission, agency, or program subject to the sunset review process. Currently, under AS 08.03.010(c)(2), the Board of Governors of the Alaska Bar Association is scheduled to terminate on June 30, 2002.

In our opinion, the termination date for this board should be extended. The regulation and licensure of attorneys contributes to the protection of the public's welfare. We recommend the legislature extend the termination date to June 30, 2006.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section.

Pat Davidson, CPA  
Legislative Auditor

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## OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 and Title 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Board of Governors of the Alaska Bar Association. The purpose of this audit was to determine if there is a demonstrated public need for the continued existence of this board and if it has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during the legislative oversight hearings to determine whether the Board of Governors of the Alaska Bar Association should be reestablished. The law currently specifies that the board will terminate on June 30, 2002.

### Objectives

The Alaska Bar Association was established in 1955 as an instrumentality of the State to ensure that only qualified members of the legal profession of good moral character are allowed to practice law in this State. A primary objective of this audit, therefore, was to determine whether the need for protection of the public continues to exist.

A secondary objective was to review the major processes instituted by the Alaska Bar Association, namely the examination of prospective members, admission, and discipline procedures, for effectiveness in meeting the public need. A tertiary objective was to evaluate those processes in particular, and Alaska Bar operations in general, for economy and efficiency of operation.

Our analysis of public need, findings and recommendations, and our conclusions have been summarized in the appropriate sections of this report.

### Scope and Methodology

Under the direction and supervision of the Division of Legislative Audit, another auditor conducted the majority of this review. We followed professional standards to determine that the other auditor was independent and that their work was competent and sufficient.

The major areas of our review were the licensing, examination, and discipline functions provided by the Alaska Bar Association, as well as board proceedings. Our audit reviewed the operations and activities of the association from January 1998 through October 2001.

Our review included the following:

- Compliance with statutes and regulations, Alaska Bar Rules, and bylaws
- Minutes of board meetings and correspondence files
- Annual reports issued by the Alaska Bar Association

- Complaints filed with the Office of the Ombudsman, Department of Labor, Department of Human Rights, and Equal Employment Opportunity Commission
- Attorney discipline files
- Attorney applications for examination and licensure
- Complaint files
- Interviews with employees of the Alaska Bar Association

## ORGANIZATION AND FUNCTION

The practice of law in the State of Alaska is regulated by the Board of Governors of the Alaska Bar Association. The board consists of twelve members, including nine attorneys elected by the active membership of the Alaska Bar Association and three non-attorney public members that are appointed by the governor and confirmed by a joint session of the legislature.

The powers and duties of the board are conferred by the Alaska Integrated Bar Act,<sup>1</sup> the Alaska Bar Rules, and the Rules of Professional Conduct, which are promulgated by the Alaska Supreme Court. Under AS 08.08.080(a), the board may approve and recommend to the state Supreme Court rules (1) concerning the admission, discipline, licensing, continuing legal education, and defining the practice of law; (2) providing for continuing legal education and for certification of a continuing legal education program; and (3) establishing a program for the certification of attorneys as specialists.

The Alaska Bar Association has two primary functions, admission and discipline of its members. To accomplish these and other functions, the Alaska Bar Association operated with a 2001 budget of approximately \$1.9 million. A schedule of revenues and expenses is included at Appendix A. Funding is provided primarily by membership dues, admission fees, lawyer referral fees, continuing legal education charges, interest income, and administrative discipline fees. The Alaska Bar Association did not receive any state funding in the period under audit.

- Admission Function: The board is responsible for screening applicants for admission to the Alaska Bar Association. The board certifies to the Alaska Supreme Court that all successful applicants are fit to practice law. The board appoints an executive director who is responsible for directing all staff functions, including the oversight of the admissions function.
- Discipline Function: The board is responsible for investigating grievances against all members of the Bar Association. The board appoints the discipline counsel. This counsel is responsible for oversight of all disciplinary actions

The Board of Governors of the Alaska Bar Association
Mauri Long, President Third Judicial District Term Expires 2004
Lori Bodwell, President-elect Fourth Judicial District Term Expires 2002
Jonathan Katcher, Vice-president Third Judicial District Term Expires 2003
Lawrence Ostrovsky, Treasurer Third Judicial District Term Expires 2004
Anastacia Cooke Hoffman, Secretary Public Member Term Expires 2003
William 'Bill' Granger Public Member Term Expires 2003
Brian Hanson First Judicial District Term Expires 2003
Robert Johnson Third Judicial District Term Expires 2004
Barbara Miklos Public Member Term Expires 2001
Kirsten Tinglum Third Judicial District Term Expires 2002
Bruce Weyhrauch First Judicial District Term Expires 2002
Daniel Winfree Fourth Judicial District Term Expires 2003

<sup>1</sup> AS 08.08.

taken against the Bar Association's membership and provides an ethics course that is required for all applicants. The Chief Justice of the Supreme Court appoints hearing committees from each judicial district. The board is responsible for issuing reprimands when warranted, and for recommending that the Supreme Court impose disbarment, suspension, probation, or public censure when appropriate.

- Miscellaneous Functions: The Alaska Bar Association also performs a wide variety of miscellaneous functions that include providing classes for continuing legal education, a lawyer referral service, and fee arbitration. In conjunction with Alaska Legal Services Corporation, the Alaska Bar Association sponsors the Alaska Pro Bono Program. The Alaska Bar Association provides a number of other member services including attorney liability protection, group insurance, the *Alaska Bar Rag*, and ethics opinions.

The Alaska Bar Association's office is located in Anchorage and is currently staffed by 15 full-time and job-share employees.

## REPORT CONCLUSIONS

In our opinion, the Board of Governors of the Alaska Bar Association should be reestablished. Since the first three attorneys were admitted to the practice of law in Alaska in 1884, membership has grown to its current level of 2,719 active members practicing in the State. The regulation and licensing of qualified attorneys contributes greatly to the protection of the public's welfare. A license to practice law in the State is a continuing proclamation by the Alaska Supreme Court that an attorney is fit to be entrusted with professional and judicial matters, to aid in the administration of justice as an attorney and counselor, and to act as an officer of the courts.

The Bar Association, through the Supreme Court, protects the public by ensuring that persons licensed to practice law are qualified. It also provides for the investigation of complaints and has established a disciplinary process designed to ensure licensed individuals act in a competent and professional manner. As such, we recommend that the legislature extend the termination date of the board to June 30, 2006.

In general, it is our opinion that the board meets the public need in an effective and economical manner. However, we have made recommendations that, if implemented, will improve the efficiency and effectiveness of the board's operations. See the Findings and Recommendations section of this report.

## FINDINGS AND RECOMMENDATIONS

In our report *Board of Governors of the Alaska Bar Association, January 2, 1998* we made recommendations in the areas of lawyer referral services, continuing legal education, and attorney disclosure. Concerns regarding attorney disclosure have been adequately addressed.

Our recommendation on lawyer referral services has not been fully implemented and is restated in this report as Recommendation No. 1.

We also suggested that the board recommend to the Supreme Court that mandatory continuing legal education (CLE) requirements for attorneys be adopted. In response, the Supreme Court adopted a voluntary, rather than mandatory, CLE program. It adopted a three-year pilot program to determine if modest reductions in licensing fees would satisfactorily encourage attorneys to earn 12 credit hours of CLE each year. This pilot program is set to end in 2002. We will review the program's results and the 12-hour guideline during the next sunset audit.

### Recommendation No. 1

The Board of Governors of the Alaska Bar Association should establish screening and oversight procedures for attorneys wishing to participate in the Lawyer Referral Service.

Alaska's Lawyer Referral Service provides an in-state, toll-free telephone number available to members of the public seeking an attorney. Persons calling the number are given the names of three attorneys who practice in the caller's area and who have expressed an interest in the field of law the person requests. A referral summary is included as Appendix D.

Attorneys are charged a \$50 annual enrollment fee for each section they want their name listed in. They are also charged a minimal fee for each referral made to them. All active Alaska Bar members in good standing are eligible and are encouraged to use the service. Participating attorneys are required to maintain errors and omissions (malpractice) insurance of at least \$50,000. However, there are no other eligibility requirements for enrollment in the service, and no screening and oversight to ensure that the attorney is qualified in any particular field of law.

This contrasts sharply with the American Bar Association's recommendation for such programs. According to the American Bar's *Model Supreme Court Rules Governing Lawyer Referral and Information Services*, "*the overriding concern of the model rules is consumer protection.*" These rules further provide that

*requirements for eligibility should include sufficient experience to ensure that the lawyer is qualified in the field of practice. The [lawyer referral] service should require proof of compliance with the requirements so established, which may include certification in affidavit or affirmation form.*

In commentary discussion, the model states:

*The importance of establishing meaningful experience requirements cannot be underestimated. It is inappropriate for the service to simply refer callers to the next lawyer on the list without determining that the lawyer is qualified in the field of practice in which legal services are needed. Since the public relies on services to provide qualified legal representation which improves on what the consumer can obtain by lot, it is incumbent upon these services to ensure that their attorneys have substantially more qualifications than mere bar membership.*  
[Emphasis added.]

The model concludes that "*the service must establish procedures for the admission, suspension, or removal of a lawyer from any panel.*"<sup>2</sup>

Alaska's referral service has no such oversight procedures. As long as members are in good standing and maintain malpractice insurance they are eligible to enroll in the service. No consideration is given to past disciplinary actions or competence in the specific field.

By providing a referral, the Alaska Bar creates the appearance that it considers the attorneys referred to be competent to practice in a particular field of law. Members of the public who call the Alaska Bar Association for a referral may erroneously assume that the Alaska Bar has taken some measures to reasonably ensure the attorney has some level of expertise in that field. However, the referral service provides members of the public with little more assurance they will receive competent legal representation than they get seeking an attorney from the telephone yellow pages.

The Alaska Bar Association has added a disclaimer as to its prerecorded Lawyer Referral message. However, this approach does not meet the standard suggested by the American Bar Association.

We believe the people of Alaska would benefit from the board taking a proactive role in screening and overseeing attorneys participating in the Lawyer Referral Service. Adopting aspects of the American Bar's recommended model rules on such services would contribute greatly to consumer protection.

## Recommendation No. 2

The Alaska Bar Association's executive director should ensure that the public is appropriately notified of board meetings.

Under AS 08.08.075, the Bar Association is subject to the Open Meetings Act.<sup>3</sup> Improved meeting notification in two areas would benefit the public.

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<sup>2</sup> The American Bar Association is a voluntary organization of attorneys. The organization's model rules, while not mandatory, provide a suggested framework for individual states' Bar Rules.

<sup>3</sup> AS 44.62.310 - 44.62.312.

First, AS 08.08.075 states that "*the public shall be given 30 days' notice of meetings of the board . . .*" The Bar Association generally does so. However, we did note that for 3 of the 23 board meetings held since 1998, the notice period was somewhat shorter, i.e., 6 days, 21 days, and 28 days.

Second, AS 44.62.310(e) requires these meeting notices to be posted on the Alaska Online Public Notice System. The Bar Association has not yet begun to utilize this system.

## ANALYSIS OF PUBLIC NEED

The following analysis of board activities relates to the public need factors defined in the "sunset" law, Alaska Statute 44.66.050. This analysis was not intended to be comprehensive, but address those areas we were able to cover within the scope of our review.

### *The extent to which the board, commission, or program has operated in the public interest.*

The Alaska Bar Association admits applicants to practice law through an examination process that was designed in consultation with a national expert. Admission is contingent on the passage of the Bar Examination, the Multi-state Professional Responsibility Examination, and a character investigation to determine if the applicant is of good moral character. The Alaska Bar Association also admits members by motion for reciprocity. This option is limited to attorneys in the active practice of law for five of the last seven years in states with which Alaska has a reciprocal agreement. Examination and admission statistics are shown in Appendix C.

The Alaska Bar Association has a lawyer discipline process for the investigation of complaints alleging attorney misconduct. Sanctions are imposed on those found to be in violation of the Rules of Professional Conduct. All public disciplinary action is subject to Supreme Court review; the Court follows the board's recommendations in most disciplinary actions. This process was developed through a cooperative effort of the Alaska Supreme Court, the Board of Governors, Alaska Bar Association staff, and a review team from the American Bar Association's Standing Committee on Professional Discipline. Discipline statistics are shown in Appendix B.

The American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement* recommends that discipline be administered through an entity other than the Alaska Bar Association. In response to this recommendation, as well as to help alleviate public concern that discipline is not taken seriously by the Alaska Bar Association, disciplinary rules provide that once a petition for formal hearing is filed, the disciplinary proceedings become open to the public.

Analysis of the complaints filed during our audit period shows that all of the grievances were reviewed, but relatively few were pursued beyond initial investigation. On its face, this may appear troubling, but further scrutiny shows it to be reasonable. Some grievances were referred to the fee arbitration committee or to a mediation panel whose services are discussed below. If a grievance involved pending litigation, it was not accepted; however, the complainant was advised that it may be resubmitted and considered once the litigation is concluded. In some instances, grievances were dismissed because action had already been taken against the attorney. Grievances are often filed that do not have merit or are not based on tangible evidence. These types of grievances are very common in some fields of legal practice. We understand that approximately half of all grievances are filed against criminal law and family practice attorneys, both areas that lend themselves to high emotion. The

potential arises that such a grievance is based on the outcome of a case, rather than attorney misconduct.

Board procedures provide for public notice of all attorneys who have been disbarred, suspended, put on probation, publicly censured, or reprimanded. The names of these attorneys are published in four major newspapers throughout the State, the local newspaper where the attorney practiced, the *Alaska Bar Rag*, and in the board's annual report.

The Alaska Bar Association offers fee arbitration as a dispute resolution process. This process provides for a single arbitrator to address disputes of \$5,000 and less. Disputes over \$5,000 are addressed by a three-member panel that consists of two attorneys and one public member. Failure by an attorney to participate in good faith in this process may result in a civil judgment being entered against the attorney and administrative suspension of the attorney's license until the judgment is paid.

Similarly, the Alaska Bar Association offers a mediation process that attempts to resolve disputes between attorneys and their clients, when the dispute is neither fee nor misconduct related. An attorney must participate in good faith if the attorney agrees to mediation.

The Alaska Bar Association maintains the Lawyers' Fund for Client Protection. The purpose of this fund is to reimburse clients who have suffered uninsured losses of money, property, or other things of value as a result of a dishonest act by an attorney. Ten dollars of each Alaska Bar Association member's annual dues is deposited in this fund.

The Alaska Bar Association jointly sponsors the Alaska Pro Bono Program with the Alaska Legal Services Corporation in which attorneys provide free legal services to low-income Alaskans.

The Alaska Bar operates a Lawyer Referral Service, which is funded by subscribing attorneys. Members of the public can call an in-state, toll-free number and receive the names of three attorneys who have listed themselves as practicing law in a certain field. However, as discussed in Recommendation No. 1, Alaska's Lawyer Referral Service does not meet the standards recommended by the American Bar Association.

***The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.***

The operations of the board are funded entirely by the membership through annual dues, admission fees, continuing legal education, lawyer referral fees, convention revenue, and interest income. The 2001 budgeted revenue was approximately \$1.9 million.

***The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.***

The board has not recommended any statutory changes during this audit period. However, the board has been active in the process of evaluating and revising the Alaska Bar Rules that govern the Alaska Bar Association's policies and procedures.

The board has also addressed certain recommendations presented in our 1998 audit. Most notably, the Alaska Bar Association introduced changes to the Alaska Bar Rules, which require written fee agreements for legal representation contracts in excess of \$500. The board prepared a pamphlet, which attorneys are encouraged to give their clients, that explains the client's rights and responsibilities. Along with the written fee agreements, attorneys are required to disclose certain items to their clients, such as the absence of professional liability insurance coverage or a reduction in coverage below required amounts.

***The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.***

The Alaska Bar Association membership is involved in its operations. This involvement may include service on one of the six standing committees or five Alaska Bar Rules committees. It may also include participation in a section or group of members with interest in a particular field, e.g., bankruptcy law or criminal defense. Each section monitors developments in the field and produces periodic continuing education programs. It may also include participating in an adjunct organization such as the Alaska Pro Bono Program or special projects like the Lawyer Referral Service.

The Alaska Bar Association publishes all proposed changes to the Alaska Bar Rules in its semi-monthly publication, the *Alaska Bar Rag*, which is distributed to all members of the Alaska Bar Association and to interested members of the public. Members are asked to submit any and all comments on proposed rule changes for review by the board.

The board also advertises board meetings in four Alaska newspapers and in the *Alaska Bar Rag*. As discussed in Recommendation No. 2, postings to the Alaska Public Online Notice System would also be helpful to the public. Adequate time is allotted, and members of the general public are encouraged to make comments at all meetings.

***The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.***

In addition to the three public members who serve on the Board of Governors, non-attorneys serve on disciplinary hearing committees and fee arbitration panels throughout the State.

As mentioned above, the Alaska Bar Association publicly advertises meetings of the board. Time is allotted at all board meetings for public comments.

*The efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.*

The Alaska Bar Association is an instrumentality of the State, but is not administratively assigned to any department. Four complaints have been filed against the Alaska Bar Association with the Office of the Ombudsman during the last four years. All four of the investigations were closed; full investigations were not considered necessary.

*The extent to which a board or commission which regulated entry into an occupation or profession has presented qualified applicants to serve the public.*

The Alaska Bar Association investigates complaints against its members. Since 1998, these activities have resulted in 65 sanctions against attorneys. Thirty of these sanctions were against nine attorneys. All nine were disbarred.

The Alaska Bar Association offers continuing legal education programs to its membership and it also maintains an educational library.

*The extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity of interest.*

We found no evidence that the board was not complying with applicable personnel practices.

Nothing came to our attention that showed the Board was in violation of any affirmative action or hiring requirements.

The Board has on occasion voiced concern over the low minority pass rate of the Alaska Bar Examination. In order to overcome this concern the Board has instituted a tutoring committee to review essay examinations and offer suggestions to the failing candidate or assistance in preparation for future examinations.

*The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.*

Please refer to the Findings and Recommendations section of this report.

**APPENDIX A**

Board of Governors of the Alaska Bar Association  
Revenues Compared with Expenditures  
 Calendar Years 1998 through 2001  
 (unaudited)

<u>Revenues</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Membership Dues	\$ 1,314,795	\$ 1,318,629	\$ 1,308,794	\$ 1,283,575
Admission Fees	207,965	189,520	200,055	196,875
Continuing Legal Education	152,514	125,540	153,886	168,915
Lawyer Referral Fees	95,808	76,225	81,462	81,500
Annual Meeting	41,907	49,919	66,892	45,000
Interest on Investments	135,512	92,938	208,140	115,000
Other	<u>88,148</u>	<u>100,761</u>	<u>104,944</u>	<u>20,979</u>
<b><u>Total Revenues</u></b>	<b><u>2,036,649</u></b>	<b><u>1,953,532</u></b>	<b><u>2,124,174</u></b>	<b><u>1,911,844</u></b>
<u>Expenses</u>				
Admissions	172,470	169,401	177,650	176,002
Board of Governors	42,191	33,936	43,289	64,627
Discipline	558,765	586,576	584,688	603,628
Administration	397,609	419,461	413,117	409,912
Lawyer Referrals	52,775	52,326	49,236	47,573
Continuing Legal Education	288,665	290,962	338,087	404,302
Fee Arbitration	47,524	54,435	52,405	52,794
Annual Meeting	51,482	80,051	79,950	80,000
Other	<u>150,936</u>	<u>163,752</u>	<u>155,857</u>	<u>155,992</u>
<b><u>Total Expenses</u></b>	<b><u>1,762,417</u></b>	<b><u>1,850,900</u></b>	<b><u>1,894,279</u></b>	<b><u>1,994,830</u></b>
<b><u>Excess (deficit) of Revenues over Expenses</u></b>	<b><u>\$ 274,232</u></b>	<b><u>\$ 102,632</u></b>	<b><u>\$ 229,895</u></b>	<b><u>\$ (82,986)</u></b>

Source: The 1998 – 2000 data was obtained from the Alaska Bar Association’s annual reports. Budget amounts are shown for 2001.

**APPENDIX B**

Board of Governors of the Alaska Bar Association  
Discipline Statistics  
 Calendar Years 1998 through 2001  
 (unaudited)

<u>Disposition of Closed Disciplinary Cases</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>Total</u>
Disbarment by Supreme Court	2	5	1	22	30
Suspension by Supreme Court	0	2	6	1	9
Public Censure by Supreme Court	0	0	0	1	1
Private Reprimand by Disciplinary Board	1	0	3	7	11
Private Admonition by Discipline Counsel	4	3	5	2	14
Dismissed	<u>28</u>	<u>25</u>	<u>27</u>	<u>12</u>	<u>92</u>
<b>Total Closed Cases</b>	<u>35</u>	<u>35</u>	<u>42</u>	<u>45</u>	<u>157</u>

<u>Status of Open Cases at Year End</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Attorney on Probation	1	1	1	1
Pending Supreme Court	2	2	1	18
Pending Disciplinary Board	2	0	18	0
Pending Hearing Committee	6	23	21	17
Pending Stipulation	3	4	11	6
Pending Approval to File Formal Hearing	0	15	0	1
Pending Approval to Issue Written Private Admonition	0	1	0	0
Pending Written Private Admonition	0	1	0	0
Abycance due to Court Case	1	0	0	1
Pending Bar Counsel Investigation/Decision	82	60	50	51
Pending Complainant Reply	0	2	0	0
Pending Respondent Response	7	2	8	8
File Under Review	<u>0</u>	<u>0</u>	<u>0</u>	<u>37</u>
<b>Total Open Cases</b>	<u>104</u>	<u>111</u>	<u>110</u>	<u>140</u>

Source: Data for 1998 – 2000 was obtained from the Alaska Bar Association’s annual reports. 2001 data was compiled by the Alaska Bar Association’s staff. These numbers reflect individual complaints filed and not the number of attorneys under investigation.

**APPENDIX C**

Board of Governors of the Alaska Bar Association  
Bar Examination and Admission Statistics

1998 through 2001  
 (unaudited)

<u>Bar Examinations</u>	<u>Number Taking Exam</u>	<u>Number Passing Exam</u>	<u>Percent Passing Exam</u>
February 1998	51	35	69%
July 1998	68	45	66%
February 1999	66	37	56%
July 1999	60	36	60%
February 2000	56	36	64%
July 2000	62	41	66%
February 2001	<u>50</u>	<u>37</u>	<u>74%</u>
<b>Total</b>	<u>413</u>	<u>267</u>	<u>65%</u>

Admission Under Motion for Reciprocity

<u>Calendar Year</u>	<u>Number Admitted</u>
1998	20
1999	13
2000	46
2001	<u>16</u>
<b>Total</b>	<u>95</u>

Source: Data for 1998 – 2000 was obtained from the Alaska Bar Association’s annual reports. 2001 data was compiled by the Alaska Bar Association’s staff. The 2001 reciprocity data is presented through August 9, 2001.

**APPENDIX D**

Board of Governors of the Alaska Bar Association  
Attorney Referrals  
 Calendar Years 1998 through 2001  
 (unaudited)

<u>Area of Discipline</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Administrative	244	267	290	234
Admiralty	46	35	34	11
Adoption	45	48	52	46
Alaska Native Law	15	20	17	19
Arts	5	5	1	3
Bankruptcy	203	143	118	116
Commercial	207	266	215	222
Construction	34	32	29	28
Consumer	568	532	700	414
Criminal: Felony	205	275	243	169
Criminal: Misdemeanor	452	334	285	218
Discrimination	62	64	38	38
Divorce/Dissolution/Custody	1,877	1,570	1,851	1,189
Eminent Domain	6	0	6	1
Environmental	3	11	2	4
Foreign Language	2	6	1	2
Guardian/Conservator	27	43	47	30
Insurance	117	73	115	80
Labor Relations	726	636	693	502
Landlord/Tenant	289	250	293	233
Malpractice	365	334	323	202
Military	39	29	35	21
Mining	6	5	1	0
Negligence	976	843	783	812
Patent/Copyright	31	0	0	40
Public Interest	0	0	6	1
Real Estate	272	234	273	187
Social Security Insurance Cases	154	3	12	0
Tax	31	31	34	0
Traffic	122	84	65	52
Trust/Will/Estate	204	187	230	161
Workers' Compensation	<u>263</u>	<u>294</u>	<u>337</u>	<u>320</u>
<b>Total</b>	<u>7,596</u>	<u>6,654</u>	<u>7,129</u>	<u>5,355</u>

Source: The 1998 – 2000 data was obtained from the Alaska Bar Association's annual reports. 2001 data was compiled by the Alaska Bar Association's staff and is reported through September 9, 2001.

January 3, 2002

Pat K. Davidson  
Legislative Auditor  
Division of Legislative Audit  
P.O. Box 113300  
Juneau, AK 99811-3300

RE: Management Letter No. 1  
Sunset Audit of the Alaska Bar Association

Dear Ms. Davidson:

Thank you for the prompt and thorough audit and the opportunity to respond to your preliminary assessment of the Alaska Bar Association.

We really appreciated the audit's conclusion that the Board of Governors meets its statutory responsibilities and public need in an effective and economical manner. We work very hard to maintain the highest level of professionalism in the Bar while remaining within our budget. It is always nice to hear that our efforts are recognized.

These comments will first address the sunset date and fiscal consequences; next we focus on the recommendations to the Board included in the audit. Steps have already been taken as to some recommendations. We have outlined our concerns about some of the proposed recommendations.

#### Sunset and Fiscal Note

The Board concurs with extending the sunset date of the Alaska Bar Association Board of Governors until June 30, 2006. Because you are preparing this audit so promptly, no bill has been filed with the legislature. However, when that occurs, there will be no fiscal note attached, as the Alaska Bar Association will not be seeking any state funding for its operational costs. The Bar Association has obtained state funding only during the limited time frame between 1981 and 1986, and only for the per diem and travel expenses of the three public members who sat on the Board. For the past 15 years, the Bar Association has paid those expenses without state funding.

Response to Legislative Audit  
January 3, 2002  
Page 2

Response to Recommendation No. 1: The Alaska Bar Association will review the Lawyer Referral Service to determine the extent it can comply with the American Bar Association Model Rules.

The audit recommends that the Board of Governors establish screening and oversight procedures for attorneys wishing to participate in the Lawyer Referral Service, consistent with the ABA Model Rules governing Lawyer Referral and Information Services.

Following the 1998 audit, the Bar Association added the following disclaimer to its prerecorded message which callers hear before they speak to the Lawyer Referral Service Assistant.

*Thank you for calling the Lawyer Referral Service. All lawyers listed with this service are members in good standing of the Alaska Bar Association.*

*However, the Alaska Bar Association does not have a program to certify lawyers as specialists, and therefore the Bar cannot vouch for the skill of any lawyer referred.*

\* \* \*

Lawyers on the Lawyer Referral Service are the only lawyers who are required to earn 12 hours of continuing legal education (CLE) credit each year, including at least one hour of ethics. Bar Rule 65, which establishes the Voluntary CLE pilot program, provides that "only members who complete the minimum recommended hours of approved CLE are eligible to participate in the Alaska Bar Association's Lawyer Referral Service."

The audit states that "no consideration is given to past disciplinary actions" in Bar members eligibility to remain on the Service. However, the Bar removes from the Lawyer Referral Service any lawyer who is subject to formal disciplinary proceedings, until the proceedings are concluded. This policy is stated in the participation agreement:

*In event that a petition is filed for removal to inactive status for disability and/or if formal disciplinary proceedings are initiated against me, or if a criminal complaint is filed or an indictment returned alleging a serious crime [as defined in Alaska Bar Rule 26(b)], I hereby agree to a suspension of referrals until final resolution of the matter.*

The Auditor quoted the ABA Model Rules' "overriding concern" as consumer protection. The Board believes that the above referenced protections, along with the requirement that practitioners using the service maintain an errors and omissions policy, meets our goals and obligation to provide a very high