

MEMORANDUM

Alaska Court System Office of Administration CMS Project

To: Court Rules Attorney

Date: September 27, 2011

From: Susan Miller, Special Projects
Charlene Dolphin, CMS Project Manager

Subject: Additional Proposed Changes in
Minor Offense Rule

Attached are additional proposed changes to District Court Criminal Rule 8 with explanations. The proposed changes are:

Proposal 1: Eliminate Bench Warrants (page 2)

Proposal 2: Service of Citations (pages 5 – 6)

Proposal 3: Telephonic Appearance at Trial (page 7)

Proposal 4: Restitution proposal – new paragraph (k)(3) (page 8)

Proposal 5: Probable Cause Not Necessary for Summonses Issued on Informations (page 9)

Proposal 6: Defendants Under 18 (page 10)

This memo is being circulated to everyone to whom we sent the August 30 memo. We are requesting that comments be submitted by October 31.

Proposal 1: Eliminate Bench Warrants

In our August 30 memo, we proposed a major revision of District Court Criminal Rule 8 on minor offenses. When we circulated the proposal for comment, we received a recommendation from Magistrate Brian Fisher of Nenana that bench warrants be eliminated in minor offense cases. We think this proposal has merit. Therefore, we are proposing additional changes to District Court Criminal Rule 8 to eliminate bench warrants in minor offense cases. The proposed changes are shown below. The justification for these changes is explained on pages 3 & 4.

Proposed Changes to the August 30th Draft

The paragraphs below are from the August 30th draft with proposed new changes shown in legislative style ("track changes").

1. (j)(2) Failure to Appear After Summons. If a defendant who has been served a summons issued under paragraph (d) fails to appear, the court ~~may~~shall enter a judgment of conviction as provided in paragraph (1) above. ~~Alternatively, the court may issue a bench warrant for failure to appear as provided in paragraph (5) below.~~
2. (j)(5) Bench Warrants Prohibited. The court shall not issue a bench warrant for failure to respond or appear in a minor offense case. [The rest of the proposed (j)(5) would be deleted.]
3. ~~(k)(5)– Bench Warrant Fee. If a bench warrant is issued, the court shall require the person to pay a bench warrant fee in the amount of \$75 regardless of whether the person is convicted. The court may waive the bench warrant fee upon a showing of good cause. Bench warrant fees imposed under this rule must be deposited in the state general fund.~~
4. (n)(2)(B) - (C) Temporary Transfer of Minor Offense Cases
(2) If the offense is a mandatory court appearance offense, upon request of the defendant the case may be temporarily transferred for arraignment from the original court to the court nearest the place where the defendant resides or is employed.
~~(2) A minor offense case may be temporarily transferred from the original court to a second court for purposes of arraignment under the circumstances described below:

(A) If there is a mandatory court appearance for the minor offense, the defendant may request a temporary transfer from the original court to the court nearest the place where the defendant resides or is employed; or

(B) If a warrant relating to the minor offense is outstanding, the defendant may request a temporary transfer from the original court to the nearest court; or

(C) If the defendant is arrested on a bench warrant relating to the minor offense, the defendant may request a temporary transfer from the original court to the court where the defendant was arrested.~~

5. (n)(5) Temporary Transfer of Minor Offense Cases.

(5) The clerk who grants the request shall immediately notify the other court of the temporary transfer. ~~Following notification, the clerk in the original court shall quash any outstanding warrants relating to the minor offense. If the request is granted by the second court and the original court cannot immediately be contacted, the clerk in the second court shall quash any outstanding warrants relating to the minor offense.~~

Justification for Eliminating Bench Warrants in Minor Offense Cases

When we sent our draft proposals to the **Traffic Court and Minor Offense Working Group (Holloway Committee)** on July 13, 2010, we also asked the committee to consider whether or not we should add a proposal eliminating bench warrants as follows:

July 13, 2010 Memo Sent to Holloway Committee

Eliminate bench warrants for failure to respond in minor offense cases.

Prior to the implementation of default judgments in 1998, the courts routinely issued bench warrants for failure to respond. This led to thousands of unserved warrants in the system and the eventual dismissal of thousands of citations because the warrants were not served after several years. In 1998, District Court Criminal Rule 8 was amended to create the default judgment process. This process has several benefits: (1) it eliminated the issuances of thousands of warrants; (2) it resulted in a conviction on the defendant's records and, for traffic offenses, the application of points against the defendant's driving record; and (3) it allows the plaintiff to collect the fine and surcharge using civil execution procedures against the PFD.

A few courts continue to issue bench warrants for failure to respond, typically when a defendant is from out of state. The courts feel that a default judgment will not be satisfied because the defendant does not receive the PFD. However, this results in defendants often not having points assessed against their driver's license in their home state.

We ask that the committee confirm with DMV whether it transfers conviction information to other states. If so, we ask that the committee make a recommendation as to whether or not the rule should be amended to eliminate bench warrants as an option in minor offense cases

The Holloway Committee's October 21, 2010, report states the following on this issue:

10/21/10 Holloway Committee Report

Elimination of bench warrants for failure to respond in minor offense cases. The working group DOES NOT SUPPORT this proposal. A few courts continue to issue bench warrants for failure to respond, typically when a defendant is from out of state. DMV reports that information concerning the bench warrant is transmitted to the defendant's home state and that it can affect the defendant's ability to renew a driver's license. Particularly with regard to out of state defendants, the working group feels bench warrants provide the court with a useful tool.

We did not include a proposal to eliminate bench warrants in minor offense cases in the draft we circulated for comment on August 30th. On September 7th, we received the following recommendation from Nenana Magistrate Brian Fisher that bench warrants be eliminated.

Email from Magistrate Fisher

Regarding new 8(j)(5) Bench Warrant, I would recommend—and I would suggest that judicial economy dictates—elimination of that process including bench warrants even as optional. I believe bench warrants for minor offenses are a terrible waste of resources. We use court resources in the first instance for issuance of the 15-day notice for optional appearance citations (assuming this requirement is not removed); we use court personnel again for issuance of the bench warrant after failure to respond to the warning; DPS resources are used to locate the defendant and either receipt bail or; DOC's resources are utilized if the defendant cannot post bail and; finally another round with court resources when the defendant is brought to court.

Default judgment is clearly the most economical way of dealing with folks who don't respond to optional court appearance deadlines, or ignore minor offense mandatory court appearances. They are, after all, classified as *minor* offenses. If the court's and/or DMV's chief concern is affecting an out-of-stater's ability to renew a license by way of Alaska's DMV notifying the offender's home state DMV that there is a bench warrant for its licensee, I would suggest that goal is as easily accomplished by DMV transmitting the court's entry of default judgment and charge information to the out-of-state DMV.

After receiving Magistrate Fisher's email, we reconsidered and decided to submit an additional change to District Court Criminal Rule 8 that would eliminate bench warrants in minor offense cases.

In addition to the reasons stated in our memo to the Holloway Committee and the reasons stated by Magistrate Fisher, another reason supporting elimination of bench warrants is that when a bench warrant is not served within a few years, the bench warrant can be quashed and the citation dismissed. (See paragraph (j) of the current rule.) By using the default judgment process instead of a bench warrant, a conviction is entered and, if the offense is a driving offense, points are assessed against the defendant's driver's license. The Div. of Motor Vehicles can forward the conviction to the defendant's home state.

Proposal 2: Service of Citations

We received comments from some agencies concerned that the proposed rule does not allow service of a citation by certified mail or by leaving it on a vehicle. As explained in our original draft, we interpret the statutes to require the peace officer who stops or contacts a defendant and issues the citation to deliver a copy of the citation to the defendant in person.

The affected paragraphs of the proposal are the following:

- (c)(6) The officer must state on the citation that the officer has reasonable grounds to believe the defendant committed the offense and must certify, under penalty of perjury, that the information in the citation is true and that the officer personally served the citation on the defendant. A citation is not required to contain a statement that there is probable cause to believe that the offense has been committed and that the defendant has committed it.
- (c)(7) The officer must deliver the citation to the defendant personally in accordance with AS 12.25.175 -.190.
- (c)(8) Corporations and Limited Liability Companies. A citation issued to a corporation or limited liability company must list the name of the business as the defendant. The officer must personally deliver the citation to a person listed in Civil Rule 4(d)(4).

Here are some alternatives for discussion:

Alternative 1: Leave the proposed draft as is. Under this alternative, agencies that want the option of serving citations by certified mail or by leaving the citation on a vehicle would need to ask the legislature to change the statutes. Note that our commentary offers an option for agencies who want to serve citations by certified mail. The option is to charge the offense on a complaint or information instead of a citation and ask the court for a summons which can be served by certified mail. The current proposal (paragraph (d)) requires a determination of probable cause before a summons is issued.

Alternative 2: This proposal is the same as #1, but in addition, it would amend paragraph (d)(1) to require the person signing the charging document to certify the same things on the charging document that are required on a citation by (c)(6). We would also amend paragraph (d)(2) to make a minor offense summons be more like a civil summons, i.e. authorize the clerk to issue a summons without a determination of probable cause.

(d) Minor Offenses Not Charged on a Citation.

- (1) If a minor offense is charged on an information or complaint without any related criminal charges, the information or complaint must include the information required by (c)(2) and the administrative bulletin issued under paragraph (c)(3) of this rule. In addition, the officer or prosecutor must state on the complaint or information that the officer or prosecutor has reasonable grounds to believe the defendant committed the offense and must certify, under penalty of perjury, that the information in the complaint or information is true. A complaint or information is not required to contain a statement that there is probable cause to believe that the offense has been committed and that the defendant has committed it. Each information or complaint may name only one defendant. Except as provided in (5) below, an information or complaint must name an individual as the defendant.
- (2) A summons shall be issued by the clerk upon request without a determination of probable cause. a judge or magistrate only if probable cause has been established as provided in Criminal Rule 4(a)(1). The summons must meet the requirements of the administrative bulletin authorized in (c)(3) of this rule.

Alternative 3: Add a new paragraph (9) to define personal service of a citation to include service by certified mail and possibly by leaving the citation at the defendant's dwelling as defined by Civil Rule 4(d)(1).

(c)(9) Personal Service Defined. In this rule, personal service means service in person as provided in Civil Rule 4(d)(1) or by certified mail as provided in Civil Rule 4(h). If certified mail is used, the officer shall file a certificate of service with the court at the same time the citation is filed. All postal receipts shall be addressed so that they are returned to the officer serving the citation. Service by mail under this paragraph is complete when the return receipt is signed. If service is made by leaving the citation at the defendant's dwelling or with an agent as provided in Civil Rule 4(d)(1), the officer shall file a certificate of service with the court at the same time the citation is filed. The certificate of service must provide the information required by Civil Rule 4(f).

Note: If this option is adopted, the citation form will have to be revised to require the officer to indicate whether the citation was served in person or by certified mail or left at the defendant's abode with a suitable person as required by Civil Rule 4(d)(1). Also, note that if service is by certified mail, the citation cannot be filed electronically because it must be filed with proof of service.

Civil Rule 4(d)(1) states: "Summons – Personal Service. ...Service shall be made as follows: (1) *Individuals*. Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

Proposal 3: Telephonic Appearance at Trial

Our August 30 proposal adds a new paragraph (t) on telephonic participation in minor offense cases. Our commentary explains that this new rule is similar to Criminal Rule 38.1 but was modified to fit the minor offense process.

We received a comment suggesting that the current draft be amended to allow witnesses and defendants to appear telephonically without approval of the other party or of the court. Since these are minor offense cases, it seems unnecessary to require defendants and witnesses (including peace officers) to travel long distances in order to participate in these proceedings.

The proposed changes shown below appear to be consistent with the purpose of Rule 8 as stated in paragraph (a) of the rule. That is, they help to make it easier for defendants and witnesses to participate in hearings and eliminate the “unjustifiable expense” of having to travel long distances.

Proposed revision of new paragraph (t):

(t) Telephonic Participation in Minor Offense Cases.

~~In any proceeding the defendant may waive the right to be present and request to participate by telephone. The defendant's waiver of the right to be physically present may be obtained orally on the record or in writing. The court may allow telephonic participation of one or more parties, counsel or the judge at any proceeding in its discretion. The court may allow telephonic participation of witnesses at trial with the consent of the prosecution and the defendant. The court may allow telephonic participation of witnesses at other hearings in its discretion.~~

(1) Defendants, counsel and witnesses who do not live or work in the community where a court hearing is scheduled may participate in the hearing telephonically by filing a written notice with the court at least 24 hours before the hearing. Defendants must also waive the right to be physically present at the proceeding. The person electing to participate telephonically must pay any long distance telephone charges. All notices to participate telephonically must be submitted on a form designated by the administrative director.

(2) In its discretion, the court may also allow telephonic participation by defendants, counsel and witnesses who live or work in the community where the court hearing is scheduled.

Possible problems with this proposal:

1. How to deal with exhibits? Examples: If a trooper is participating telephonically, how does the trooper submit a drawing of an accident? Or, if the defendant is participating telephonically, how does the defendant get access to a drawing made by the trooper in the courtroom? Would the use of faxes and emailed scans address this problem?
2. Do the other parties need to be notified, and if so, how much notice is needed and who should be required to give it?
3. Are there concerns about identity of the person participating telephonically?

Do you have other concerns or suggestions?

Proposal 4: Restitution

Nome Magistrate Brad Gater asked how our Rule 8 proposal might affect the judge's authority to order restitution under AS 16.05.925(b) [the fish and game statute that allows the court to order certain amounts of restitution when specified game is taken illegally]. We responded that the Fish & Game Bail Forfeiture Schedule (Admin Rule 43.2) already limits the penalty to the "bail amounts listed and forfeiture of all seized items listed on the citation." The language in Administrative Rule 43.2 comes from the statute that requires the Supreme Court to create this bail schedule (AS 16.05.165(d)), which states: "Forfeiture of bail and all seized items is a complete satisfaction for the misdemeanor."

So it seems to us that Administrative Rule 43.2 and AS 16.05.165(d) already eliminate the possibility of ordering restitution for any big game offenses that are on the Fish & Game Bail Forfeiture Schedule. This is not changed by our District Court Criminal Rule 8 proposal. The solution to this problem may be to suggest that those offenses be removed from the bail schedule.

However, we think it might be a good idea to add the restitution provision in new subparagraph (k)(3) below, clarifying when AS 16.05.925(b) restitution can be ordered in minor offense cases. We also propose changing the word "sentence" in subparagraph (k)(1) to "fine" to better state the intent of the proposal.

(k) Judgment, Costs, Fees and Relief from Default Judgment.

- (1) **Alternative #1: Mandatory Penalty.** For offenses listed on a bail forfeiture schedule or municipal fine schedule, the scheduled amount is the mandatory ~~sentence~~fine and may not be increased or decreased.

Alternative #2: Presumptive Penalty. For offenses listed on a bail forfeiture schedule or municipal fine schedule, the scheduled amount is the presumptive ~~sentence~~fine and may only be reduced by the sentencing judge for good cause. Pursuant to AS 12.25.230(c), the scheduled amount may not be increased.

- (2) **Surcharge and Forfeiture.** In addition to any fine, a judgment of conviction in a minor offense case must order

(A) payment of any applicable surcharge, and

[Commentary: The surcharge statute which requires surcharges when bail is forfeited or a defendant is otherwise convicted is AS 12.55.039.]

(B) forfeiture of all items seized, as authorized by statute or ordinance, and listed on the citation.

- (3) **Restitution.** For offenses not listed on a bail forfeiture schedule or fine schedule, the court may order restitution as provided in AS 16.05.925(b) or any other statute or ordinance authorizing restitution.

We would then renumber the rest of the subparagraphs in proposed paragraph (k).

**Proposal 5: Probable Cause Not Necessary
for Summonses Issued on Informations**

Seward Magistrate George Peck pointed out that under Criminal Rule 9, it is not necessary for the court to find probable cause before issuing a summons when the charging document is an information. Rule 9 (Warrant or Summons Upon Indictment or Information) states in paragraph (a): “ ...The clerk shall issue a summons instead of a warrant upon the request of the prosecuting attorney, or by direction of the court....”

Therefore, we are changing our proposed subparagraph (d)(2) as follows:

- (d) Minor Offenses Not Charged on a Citation.
 - (1) If a minor offense is charged on an information or complaint without any related criminal charges, the information or complaint must include the information required by (c)(2) and the administrative bulletin issued under paragraph (c)(3) of this rule. Each information or complaint may name only one defendant. Except as provided in (5) below, an information or complaint must name an individual as the defendant.
 - (2) A summons upon a complaint shall be issued by a judge or magistrate only if probable cause has been established as provided in Criminal Rule 4(a)(1). A summons upon an information shall be issued by the clerk as provided in Criminal Rule 9(a). The summons must meet the requirements of the administrative bulletin authorized in (c)(3) of this rule.

...

Note: This change will not be necessary if the changes described in Proposal 2 Alternative 2 (page 5) are adopted.

Proposal 6: Defendants Under 18

Several people commented on proposed new paragraph (h) which requires defendants under age 18 at the time of the offense to be accompanied by an adult at all hearings. The comments suggest that we change the rule to make it clear that after defendants reach age 18, they no longer need to bring their parents to court even though they were under 18 when the alleged offense occurred.

The language in proposed paragraph (h) comes from paragraph (e)(1) in the current rule (on arraignments for mandatory court appearance offenses). We moved it to a separate paragraph so it will apply to both mandatory appearances and optional appearances. The only change we made was to add the phrase at the end of the sentence: "at any court appearance for a minor offense."

The following is our proposed change to address the comments:

- (h) **Persons Under 18.** A person under 18 years of age at the time of the offense must be accompanied by a parent, guardian, or legal custodian at any court appearance for a minor offense until the person reaches age 18.