

HB

340

STATE OF ALASKA
THE LEGISLATURE

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May, 1988

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

Mary Van Nimwegen

House Judiciary:

2-17-88

3-08-88

(7)

HOUSE COMMITTEE REPORT

Date referred: 1/22/88

FURTHER REFERRALS:

DATE: March 8, 1988

The Judiciary Committee has considered HB 340

"An Act granting immunity from civil liability for providing volunteer emergency services."

RECOMMENDS:

- replace with CS HB 340 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of inter.

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published Jan 22, 1988
- zero with analysis

SIGNING DO PASS:

Laura A. Baker
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]

SIGNING OTHER RECOMMENDATIONS:

[Signature]
 Chairman's signature

Original sponsors: Davis, Koponen,
Ulmer, et al.

Adopted

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 340 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act granting certain volunteers immunity from
7 civil liability for providing emergency services."

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

9 * Section 1. AS 09.65.090 is amended by adding new subsections to read:

10 (c) A member of an organization that exists for the purpose of
11 providing emergency services is not liable for civil damages for
12 injury to a person that results from an act or omission in providing
13 first aid, search, rescue, or other emergency services to the person,
14 regardless of whether the member is under a preexisting duty to render
15 assistance, if the member provided the service while acting as a
16 volunteer member of the organization; in this paragraph, "volunteer"
17 means a person who is paid not more than \$10 a day and a total of not
18 more than \$500 a year, not including ski lift tickets and reimburse-
19 ment for expenses actually incurred, for providing emergency services.

20 (d) The immunity provided under (c) of this section does not
21 apply to civil damages that result from providing or attempting to
22 provide any of the following advanced life support techniques unless
23 the person who provided them was authorized by law to provide them:

- 24 (1) electric cardiac defibrillation;
- 25 (2) administration of antiarrhythmic agents;
- 26 (3) intravenous therapy;
- 27 (4) intramuscular therapy; or
- 28 (5) use of endotracheal intubation devices.

Original sponsors: Davis, Koponen,
Ulmer, et al.

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 340 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

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10 (c) An organization and its members are not liable for civil
11 damages ^{to an injured party} as a result of an act or omission in providing first aid,
12 search, rescue, or other emergency services, ^{to that party} regardless of whether the
13 organization or members are under a preexisting duty to render assis-
14 tance, if

15 [(1) the organization exists for the purpose of providing
16 the service rendered; and

17 (2)] the member provided the service while acting as a
18 volunteer member of the organization. ⁽¹⁾ in this paragraph, "volunteer"
19 means a person who ^{receives cash payment of} [is paid] not more than \$10 a day and a total of not
20 more than \$500 a year, not including reimbursement for expenses ac-
21 tually incurred, for providing emergency services. ⁽²⁾ "organization" means

22 (d) The immunity provided under (c) of this section does not
23 apply to civil damages that result from providing or attempting to
24 provide any of the following advanced life support techniques unless
25 the person who provided them was authorized by law to provide them:

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Original sponsors: Davis, Koponen,
Ulmer, et al.

BY THE LABOR AND
COMMERCE COMMITTEE

1 IN THE HOUSE

2

CS FOR HOUSE BILL NO. 340 (L&C)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

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14 organization or members are under a preexisting duty to render assis-
15 tance, if

16 (1) the organization exists for the purpose of providing
17 the service rendered; and

18 (2) the member provided the service while acting as a
19 volunteer member of the organization; in this paragraph, "volunteer"
20 means a person who receives financial consideration of not more than
21 \$10 a day and a total of not more than \$500 a year, not including
22 reimbursement for expenses actually incurred, for providing emergency
23 services.

Issues:

Preexisting duty:

definition volunteer:

financial consideration

organization & members

EMS

AMENDMENT

by BARNES

Offered in the HOUSE

To: CSHB 340 (L&C)

Page 1, Line 13:

After "services," insert "not to include advanced life support procedures as defined in AS 18.08.090" and before "regardless".

option 1

"in this paragraph "organization" means a non-governmental entity incorporated under AS 10.20.005 or exempt from taxation under US 26.501.(c) (3) and (4), excluding hospitals.



Alaska State Legislature

Representative Mike Davis

District 19

P.O. Box V
Juneau, Alaska 99811
(907) 456-4930/4941

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-8161

TO: All Representatives
FROM: Rep. Mike Davis
DATE: March 17, 1988
RE: CSHB 340, granting immunity from civil liability for providing volunteer emergency services.

CSHB 340 is on the House calendar today. This bill amends the Good Samaritan Act to protect volunteers in first aid and rescue organizations from liability.

Ordinary citizens who try to help in emergency situations are protected from liability by the Good Samaritan Act, AS 09.65.090. Paramedics and EMTs who are certified by the state are covered in liability questions by AS 18.08.086. However, members of volunteer rescue organizations such as the National Ski Patrol, Civil Air Patrol, and mountain rescue groups may not have any statutory protection.

First aid and rescue volunteers are vulnerable to litigation because they have an obligation to help people while serving in their organizations. The Alaska Supreme Court has ruled that the Good Samaritan Act does not protect those who have a "pre-existing obligation to assist individuals in danger".

CSHB 340 would protect emergency services volunteers from liability for their good faith attempts to aid those in danger. However, they would still be liable for damages as a result of "gross negligence, recklessness, or intentional misconduct" as stated in subsection (b) of the existing Good Samaritan Act.

Lee Lee v State 1971

Original sponsors: Davis, Koponen,
Ulmer, et al.

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2

CS FOR HOUSE BILL NO. 340 (Judiciary)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

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16 volunteer member of the organization; in this paragraph, "volunteer"
17 means a person who is paid not more than \$10 a day and a total of not
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19 ment for expenses actually incurred, for providing emergency services.

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27 (4) intramuscular therapy; or
28 (5) use of endotracheal intubation devices.

LETTER OF INTENT

It is the intent of the House Judiciary Committee that ski lift tickets not be considered payment of volunteers for the purposes of AS 09.65.090.

5-1495L
Hein
2/26/88

Original sponsors: Davis, Koponen,
Ulmer, et al.

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 340 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

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14 tance, if

15 (1) the organization exists for the purpose of providing
16 the service rendered; and

17 (2) the member provided the service while acting as a
18 volunteer member of the organization; in this paragraph, "volunteer"
19 means a person who is paid not more than \$10 a day and a total of not
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MEMORANDUM INRE: CSHB 340 (L&C)

TO: RAMONA

FROM: ROGER

This bill deals with volunteer emergency service organizations and civil liability. This Act expands AS 09.65.090 to include such organizations as ski patrols, search and rescue teams and other such efforts. This legislation would enable volunteer members of organizations described hereinabove to participate in these worthwhile and oftentimes lifesaving operations without fear of civil suit.

In regard to Page 1, Line 13, some concern has been expressed by Dept of H & SS that this "other emergency services" provision does not include advanced life support services such as defibrillation, drug therapy, intravenous therapy and advanced airways treatment that should only be provided by trained and licensed persons.

It is likely that the enactment of this legislation would increase the number of emergency service volunteers and would decrease the rate of attrition among emergency service volunteers. This is good legislation, and would allay the fears of some of your constituents.

Appellant did object to the borrowed servant instruction given below on the general ground that it was not a proper statement of the law. However, such a general objection is particularly noninformative to the trial judge who is called upon to instruct on the law. It simply does not meet the requirements of Civil Rule 51(a) which provides in part:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly* the matter to which he objects and the grounds of his objection. (emphasis added)

We have construed this section to require specific objection in criminal cases before claimed error in the instructions will be considered on appeal.² There is no compelling reason to relax this requirement in civil litigation where there are even greater opportunities to refine the issues before trial.

For the Rule 51(a) procedure to function properly, a substantial burden must be imposed on counsel to present specific objections. Otherwise, the trial judge will be unable to adequately review the objection and consider the argument made in formulating jury instructions.

Under the provisions of the Second Restatement of Agency,³ the instruction given was not such plain error as should lead to this court's intervention in the absence of a proper objection at trial. I would, therefore, affirm the judgment below.

But if you should find that Dan Walsh was negligent, and that his negligence was a proximate cause of injury to plaintiff (and that the evidence does not support the defense of contributory negligence) then you must decide whether at the time of the accident Dan Walsh was acting within the scope of his employment.

If you find either that Dan Walsh was not the agent (or employee) of the defendant, or, if the agent (or employee), that he was not acting within the scope of his employment, then your verdict must be in favor of the defendant; but if you find that Dan Walsh was acting as

Elizabeth Llewellyn LEE, a minor, by
through her next friend, Sallie New-
man Lee, natural mother,

v.

STATE of Alaska and Frank Johnson,
State Trooper, Appellees.

No. 1395.

Supreme Court of Alaska.

Nov. 30, 1971.

Plaintiff who was shot by state trooper while he was rescuing her after lioness grabbed her arm in its teeth and held her. Bars of cage brought suit against operator of amusement concession, state trooper of the state. The Superior Court, Third Judicial District, Edward V. Davis, Jr., entered judgment for state officer and state trooper and plaintiff appealed. The Supreme Court, Boney, C. J., held that state trooper was under duty to go to aid of plaintiff minor and Good Samaritan Statute did not apply and jury should have been instructed to return a verdict for plaintiff and against defendant state trooper if defendant state trooper had been ordinarily negligent. Plaintiff further held that evidence that plaintiff minor was shot by state trooper, an expert marksman, created question for jury whether state trooper had been ordinarily negligent.

Judgment reversed and case remanded for new trial.

Erwin, J., not participating.

agent (or employee) of the defendant and within the scope of his employment and if you will have found in plaintiff's favor on the other issues mentioned in this instruction then you [sic] verdict must be for the plaintiff.

2. Pope v. State, 478 P.2d 801, 805-808 (Alaska 1970), reh. denied 480 P.2d 687 (Alaska 1971). See also, Bakken v. State, Op. No. 728, 489 P.2d 120, at 123 (Alaska, 1971) (Erwin, J., dissenting).

3. Restatement (Second) of Agency § 227 (1958).

1. Negligence ⇨12

Purpose of Good Samaritan Statute is to induce voluntary rescue by removing fear of potential liability which acts as an impediment to such rescue and it is directed at persons who are not under some preexisting duty to rescue. AS 09.65.090.

2. States ⇨79, 112

State trooper was under duty to go to aid of plaintiff minor whose arm was grabbed by lioness in its teeth and who was held by lioness to bars of cage, and Good Samaritan Statute did not apply and jury should have been instructed to return a verdict for plaintiff and against defendant state trooper who shot plaintiff during rescue and defendant state if they found state trooper to have been ordinarily negligent. AS 09.65.090, 18.65.080, 18.65.110, 44.41.020.

3. Negligence ⇨136(14)

Evidence that plaintiff minor was shot by state trooper, an expert marksman, who was rescuing her after lioness had grabbed her arm in its teeth and held her to bars of cage created question for jury whether state trooper had been ordinarily negligent.

4. Appeal and Error ⇨1194(2)

Where plaintiff suffered two distinct sets of injuries of those relating to bite of lioness and those caused by errant gunshot by state trooper, her rescuer, and under instruction jury could have awarded damages against operator of amusement concession for both sets of injuries and jury's verdict for officer and state had to be reversed on appeal, on remand, if officer and state were held liable and damages were awarded against them, they should be entitled to credit for that portion of \$15,000 paid by operator of amusement concession which related to gunshot wound but were not entitled to credit for that portion relating to the bite.

5. Trial ⇨335

Where plaintiff, who suffered injuries relating to bite of lioness and to errant gunshot by state trooper, her rescuer, brought suit against operator of amusement concession and against state and state

trooper and recovered against operator of amusement concession and judgment in favor of state trooper and state had to be reversed on appeal, neither plaintiff nor defendants waived their rights to benefits of apportionment of damages by failure to request special interrogatories requiring jury to apportion damages awarded against operator of amusement concession.

6. Appeal and Error ⇨1194(2)

Where plaintiff, who suffered injuries relating to bite of lioness and to errant gunshot by state trooper, her rescuer, recovered against operator of amusement concession and judgment in favor of state and state trooper had to be reversed on appeal, apportionment of damages awarded against operator of amusement concession was necessary and had to be made on remand on evidence presented to the trial court and plaintiff would have to prove by preponderance of evidence to what extent damages awarded were compensation for the bite.

7. Release ⇨25

Full compensation amounts to satisfaction and should be carefully distinguished from a release; two factors properly used to distinguish a release from a satisfaction are: intent of parties and extent of compensation.

8. Release ⇨55

Law presumes a release to be a satisfaction unless plaintiff can prove otherwise.

Ernest Z. Rehbock and J. L. McCarrey, Jr., Anchorage, for appellant.

George N. Hayes and Daniel A. Moore, Jr., of Delaney, Wiles, Moore, Hayes & Reitman, Anchorage, for appellees.

Before BONEY, C. J., and DIMOND, RABINOWITZ and CONNOR, JJ.

OPINION

BONEY, Chief Justice.

The plaintiff-appellant appeals from a judgment for the defendants-appellees.

On August 19, 1967, the plaintiff, then a child of twelve, and a thirteen year old friend attended an amusement park in Anchorage, Alaska. They stopped to pet a lioness kept in a cage by the operator of the amusement concession, Alaska Amusements, Inc. The beast thereupon grabbed the plaintiff's arm in its teeth and held her to the bars of the cage. The plaintiff's companion tried unsuccessfully to secure her release by beating the lioness over the head with a pipe, and then ran to a nearby State Trooper office for help. Defendant Johnson, an Alaska State Trooper, was thus brought to the scene. Johnson placed his arm around the plaintiff, cocked his gun, and shot the lioness in the head. He then cocked his gun again in preparation for a second shot. However, his first shot had found its mark. The lioness dropped dead releasing the plaintiff's arm. Apparently recoiling from this release, the plaintiff and Officer Johnson fell to the ground. His gun went off wounding the plaintiff in her right thigh.

On July 10, 1968, the plaintiff filed suit against Alaska Amusements, Inc., Officer Johnson, and the State of Alaska. The case was tried by a jury, which served in only an advisory capacity as to the state.¹ The plaintiff was granted a jury verdict against Alaska Amusements, Inc., and a judgment has been entered for \$15,000. No appeal has been taken from that judgment and according to counsel for the plaintiff, it has been satisfied. The jury returned a verdict for Officer Johnson and the state. Judgment thereon was entered for Officer Johnson. The court adopted the jury verdict for the state and accordingly entered judgment against the plaintiff.

1. AS 09.50.290 requires that tort claims against the state be tried by the court without a jury.

2. W. Prosser, *Law of Torts* § 58, at 340 (4th ed. 1971).

The central issue in this appeal is whether, as the trial court ruled, the Alaska Good Samaritan Statute, AS 09.65.090, shields the defendants from liability for ordinary negligence. The plaintiff argues that the court below improperly applied that statute by instructing the jury that:

AS 09.65.090 reads as follows:

(a) A person who, without expecting compensation, renders care to an injured or sick person, who appears to be in immediate need of aid is not liable for civil damages as a result of an act or omission in rendering emergency care, or as a result of an act or failure to act to provide or arrange for further medical treatment or care for the injured person.

(b) This section shall not preclude liability for civil damages as a result of gross negligence or intentional misconduct. Gross negligence means reckless, wilful, or wanton misconduct.

Unless you find that Frank Johnson acted in a grossly negligent manner as the statute defines "gross negligence" in the rescue efforts he made to extricate Elizabeth Lee, or unless you find that he intentionally shot her, you must find for Frank Johnson and against the plaintiffs.

[1] At common law there is no duty to rescue. "[T]he law has persistently refused to recognize the moral obligation of common decency and common humanity to come to the aid of another human being who is in danger * * *." ² Only in certain limited situations, as for example where the actor was responsible for placing the imperiled person in his endangered position, has a duty been recognized.³ However, once rescue operations have begun, the rescuer is held to a duty of due care.⁴ Professor Prosser has pointed out that "[t]he result of all this is that the good Samaritan who tries to help may find him-

3. *Id.* 341-343.

4. Restatement (Second) of Torts § 323 (1965); W. Prosser, *Law of Torts* § 58, at 343 (4th ed. 1971).

self mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing."⁵ AS 09.65.090 and similar statutes in some forty-two states and the District of Columbia are in response to this problem.⁶ Their purpose is to induce voluntary rescue by removing the fear of potential liability which acts as an impediment to such rescue. Thus they are directed at persons who are not under some pre-existing duty to rescue.⁷

[2] We feel, therefore, that the applicability of AS 09.65.090 to Officer Johnson depends upon whether or not he was under a duty to rescue the plaintiff. If he was, then he was not a member of that group of persons to whom the statute is directed and he should be denied its protection. No case has been found which considers the applicability of a Good Samaritan Act to a policeman.⁸

In discussing whether or not Officer Johnson had a duty to assist the plaintiff, both parties have directed our attention to provisions of Alaska law. The plaintiff notes that state troopers are employees of the Department of Public Safety and then cites AS 44.41.020:

The Department of Public Safety shall administer functions relative to the protection of life and property.

The defendants argue that the duties of police officers are statutory, and then refer to AS 18.65.080:

The Department of Public Safety and each member of the state troopers is charged with the enforcement of all criminal laws of the state, and has the power of a peace officer of the state or a municipality and those powers usu-

ally and customarily exercised by peace officers. Each member of the state troopers may prevent crime, pursue and apprehend offenders, obtain legal evidence, institute criminal proceedings, execute any lawful warrant or order of arrest, make an arrest without warrant for a violation of law committed in his presence, and may cooperate with other law enforcement agencies in detecting crime, apprehending criminals, and preserving law and order in the state.

The defendants also cite AS 18.65.110:

Members of the state troopers may not interfere with the rights or property of any person except in a lawful manner necessary for the prevention of crime or the capture and arrest of an offender.

The plaintiff seeks to have this court read AS 44.41.020 to indicate that the duties of the police are extremely broad—and thereby encompass actions such as those of Officer Johnson. The defendants see the statutes they cite as precise delineations of and limitations on the powers and duties of the police. We feel that a holding that police officers have no duty to rescue would not comport with public conceptions of their role. In *Wood v. Morris*⁹ the court felt that the applicability of the Georgia Guest Statute turned, in part, on whether the policeman transporting an injured girl in his car had an obligation to care for her. The court said:

Whether or not the defendant policeman had any statutory obligation to care for the plaintiff, we think that there was an obligation in fact arising out of the customary role played by police officers in such emergencies, pursuant to

5. W. Prosser, *Law of Torts* § 56, at 344 (4th ed. 1971).

6. The Good Samaritan Statutes have not gone uncriticized. Note, *Good Samaritans and Liability for Medical Malpractice*, 64 *Colum.L.Rev.* 1301 (1964); Note, *California Good Samaritan Legislation: Exemptions from Civil Liability While Rendering Emergency Medical Aid*, 51 *Calif.L.Rev.* 816 (1963).

7. A rescuer under a pre-existing duty to rescue would not need the added inducement of immunity from civil liability for his ordinary negligence.

8. The two-page discussion in *Annot.*, 39 *A.L.R.3d* 222 (1971), is indicative of the dearth of material on the subject of "Construction of 'Good Samaritan' Statute Excusing from Civil Liability One Rendering Care in Emergency."

9. 109 *Ga.App.* 148, 135 *S.E.2d* 484 (1964).

their general responsibility of protecting the lives and welfare of citizens at large.¹⁰

We agree. We hold that Officer Johnson was under a duty to go to the aid of the plaintiff. Therefore, we conclude that it was error for the trial court to apply the Alaska Good Samaritan Statute. The jury should have been instructed to return a verdict for the plaintiff and against the defendants¹¹ if they found Officer Johnson to be *ordinarily* negligent. As this question has not been presented to a jury, the case should properly be remanded for a new trial.

[3] The defendants offer two arguments against a remand for a new trial. The defendants contend first that there is insufficient evidence for a jury to find that Officer Johnson was *ordinarily* negligent. The jury considered only whether he had been *grossly* negligent. Whether Officer Johnson acted reasonably is a jury question.¹² A young girl was shot by a rescuer who was an expert marksman; it is apparent that there is sufficient evidence for a jury to find that he had been *ordinarily* negligent.

The defendants also contend that this case is moot. They argue that the plaintiff, by virtue of her judgment against Alaska Amusements, has been compensated for her gunshot wound. The defendants maintain that an additional award for ordinary negligence against them on remand would result in a double recovery. The argument relies primarily on Instruction 21 which reads as follows:

10. 135 S.E.2d at 487.

11. The state's liability if Officer Johnson is held liable, seems to have been conceded. No argument on the issue has been offered; the liability would flow from the doctrine of respondeat superior.

12. Cf. *Mallonee v. Finch*, 413 P.2d 159, 161 (Alaska 1966); *Crawford v. Rogers*, 406 P.2d 189, 194 (Alaska 1965); *McCoy v. Alaska Brick Co.*, 389 P.2d 1009-1010 (Alaska 1964).

13. See, e.g., *Laurenzi v. Vranizan*, 25 Cal. 2d 808, 155 P.2d 633, 637 (1945); W.

If you find that Alaska Amusements, Inc. was negligent toward the plaintiff, Elizabeth Lee, and that its negligence was the proximate cause of her having been bitten by the lion, any further injuries suffered by her as a result of the gunshot wound are also part and parcel of the original negligence of Alaska Amusements, Inc., provided you find that Alaska Amusements, Inc.'s negligence placed Elizabeth Lee in a position of peril that included possible danger to her attendant upon a rescue operation. It is not necessary that Alaska Amusements, Inc., could foresee the exact nature and kind of further danger that might occur during a rescue operation. It is only necessary that reasonable men, in the position of Alaska Amusements, Inc., could foresee the possibility of danger to another during any rescue operation that might come about as the result of the method and manner of keeping the lion.

We agree with the defendants that, to the extent the plaintiff has already been compensated for certain of her injuries, she should not, on remand, be allowed a second recovery for those injuries.¹³ Under Instruction 21 the damages awarded by the jury could have included compensation for the gunshot wound.¹⁴ However, it does not follow that the case is mooted and a remand precluded. At the very least, costs and attorney's fees to the prevailing party or parties are in issue between the plaintiff and these defendants.¹⁵

Prosser, *Law of Torts* § 48, at 300 (4th ed. 1971):

When payment of the judgment in full is made by the judgment debtor, there is no doubt that the plaintiff is barred from a further action against another who is liable for the same damages, or from enforcement of another judgment against him. (Footnotes omitted)

14. The gunshot wound was the only injury the plaintiff suffered from Officer Johnson upon which she has sued.

15. Pursuant to Alaska R.Civ.P. 82(a), the trial court attorneys' fees and costs

[4] The plaintiff suffered two distinct sets of injuries: those relating to the bite of the lioness and those caused by the errant gunshot. Under Instruction 21 the jury could have awarded damages against Alaska Amusements, Inc., for both sets of injuries. On remand, if the defendants are held liable and damages are awarded against them, then they should be entitled to a credit for that portion of the \$15,000.00 paid by Alaska Amusements, Inc., which related to the gunshot wound.¹⁶ They are not entitled, however, to a credit for that portion relating to the bite.

The damages awarded against Alaska Amusements, Inc., were not apportioned by the jury. A lump sum award was returned in accordance with Instruction 25, in which, in relevant part, the judge instructed the jury that:

If you should find for the plaintiff on the question of liability you will then determine as to the amount she is entitled to recover from the evidence and under these instructions. If you find against only one defendant then that amount will be entered in the verdict form prepared for the plaintiff and against that defendant. If you find in favor of plaintiff as against both defendants [Alaska Amusements, Inc., and Officer Johnson] then you should divide the total amount of damages between the two defendants as you may determine proper from the evi-

dence in this case. Enter the amount so determined as to each defendant on the appropriate verdict.¹⁷

[5] One easy solution to this difficult problem would be to hold that either the plaintiff or the defendants have waived their right to the benefits of apportionment by their failure to request special interrogatories requiring the jury to apportion the damages awarded against Alaska Amusements, Inc.¹⁸ Such a holding would be unwarranted. To impose the burden of requesting special interrogatories on either party because that party could thereby benefit by protecting its rights would be to hold that the burdened party, but not the other party, should have foreseen the present difficulty. There is no reason to distinguish between the parties in this regard.

Another easy solution would be to assume that the full amount awarded against Alaska Amusements, Inc., was compensation either for the bite alone or for the gunshot wound alone. But we cannot assume that the jury awarded no damages for the bite of the lioness since the primary negligence of Alaska Amusements, Inc., was in the keeping of the beast. Instruction 21 precludes the contrary assumption that the full \$15,000.00 was awarded as compensation for the bite.

[6-8] Therefore, an apportionment of the damages awarded against Alaska Amusements, Inc., is necessary.¹⁹ The ap-

against the plaintiff in the amount of \$2,620.60, \$1,310.30 to each of these two defendants.

16. Cf. W. Prosser, *Law of Torts* § 48 at 300 (4th ed. 1971):

"[E]ven a partial satisfaction of one judgment will not prevent obtaining or enforcing another, although it is everywhere agreed that the amount received must be credited pro tanto against the amount to be collected. (Footnote omitted.)

17. The jury could determine damages only as to Alaska Amusements, Inc., and Officer Johnson. The state's liability and damages against the state were to be determined by the judge. AS 09.50.200.

18. Alaska Amusements, Inc., was the only defendant potentially liable for both sets of injuries.

19. The situation is analogous to a release in which the plaintiff covenants with one joint tortfeasor not to sue. By accepting payment from Alaska Amusements, Inc., of a judgment which could have included compensation for the gunshot wound, the plaintiff has released Alaska Amusements, Inc., from any further liability. But acceptance of that payment does not necessarily indicate that the plaintiff has been fully compensated for the gunshot wound. Full compensation amounts to satisfaction and should be carefully distinguished from a release.

portionment must be made, on remand, on evidence presented to the trial court.²⁰ In apportioning those damages, the trial court will not be asked to determine what transpired in the jury room at the first trial. Rather, the plaintiff will have to prove, by a preponderance of the evidence, to what extent the damages awarded against Alaska Amusements, Inc., were compensation for the bite. If the plaintiff establishes that the bite-related damages should have been \$15,000.00 or more, then the defendants will receive no credit; but if the plaintiff can only establish that the bite-related damages were of an amount less than \$15,000.00, then the difference between that amount and \$15,000.00 will be credited against any damages awarded against the defendants.²¹ The burden of proving an apportionment falls upon the plaintiff because, unless she can demonstrate to the contrary, her judgment is presumed to constitute full compensation.²²

On remand, then, the procedure will be as follows. A new trial will be required as

The two factors properly used to distinguish a release from a satisfaction are the intent of the parties and the extent of compensation. 1 F. Harper & F. James, *The Law of Torts* § 10.01, at 711-12 (1956). Here their intent is nonoperative in that the "release" was by way of judgment, not contract; and the extent of compensation is what is to be determined on remand when the award against Alaska Amusements will be apportioned. *Of. Aldridge v. Morris*, 337 Ill.App. 369, 86 N.E.2d 143, 146-49 (Ill.App.1949); *Laurenzi v. Vranizan*, 25 Cal.2d 806, 155 P. 2d 633, 637 (1945).

20. As to the state, the apportionment will have to be made by the judge. AS 00-50.290. As to Officer Johnson, unless he and the plaintiff agree that the judge may apportion the damages and thereby determine the extent of the credit, his demand for a jury trial will still be in effect and the issue of apportionment will have to be put before the jury on re-

to both liability and damages. The jury will determine Officer Johnson's liability; the judge will determine the state's liability. If the defendants are found liable, then the jury will assess damages against Officer Johnson and the judge will have to make an independent finding as to damages against the state. The judge will also have to determine what portion, if any, of the \$15,000.00 awarded against Alaska Amusements, Inc., will be allowed as a credit against those damages. In like manner, the jury will determine what portion, if any, of that \$15,000.00 will be allowed as a credit against the damages awarded against Officer Johnson. In this way, there can be no double recovery by the plaintiff for her injuries.

We conclude that the case is not moot and that a remand for a new trial is appropriate.

The judgment is reversed and the case is remanded for a new trial.

ERWIN, J., not participating.

mand. See Alaska Constitution Art. I § 16; Alaska R.Civ.P. 38.

21. Thus, for example, if it is determined that \$10,000.00 of the \$15,000.00 related to the bite, then a \$5,000.00 credit will be allowed against any damages awarded against these defendants.

22. To continue the analogy discussed in note 19, *supra*, the law presumes a release to be a satisfaction unless the plaintiff can prove otherwise. *Ellis v. Essau*, 50 Wis. 138, 6 N.W. 518, 520 (1880). Here the amount paid by Alaska Amusements, Inc., for the gunshot wound is uncertain. Under the analogy, this amount is analogous to the sum paid for the release. In showing the release not to be a satisfaction, the plaintiff must prove both the extent of her damages (i. e. what amount would be a satisfaction) and the value of the release. Only if both figures are before the trier of fact can the two be compared to determine that the release does not amount to a satisfaction.

clear that the lawyer-as-witness disciplinary rules would not preclude Mr. McGee and his firm from continued representation of plaintiff. Rule 3.7(b) provides that,

"A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [pertaining to conflict of interest with present clients] or Rule 1.9 [pertaining to conflicts with former clients]." See 52 U.S.L.W. 19 (Aug. 16, 1983).

See *American Cable*, supra at 1196 n. 2.

The court is convinced that defendant has not sustained its burden to show that Andrea Ramsay's testimony will in some manner taint the trial or the legal system. See *Greenebaum-Mountain Mtg.*, supra, at 1353-54. Defendant has shown no prejudice to itself nor any other reason why the trial cannot be conducted in fairness to all if Ms. Ramsay testifies. See *Greenebaum*, supra, at 1354 (main purpose of Canon 5 is to avoid prejudice at trial). As stated in *American Cable*, supra at 1196:

The rules prevent situations in which others might think the lawyer, as witness, is distorting the truth for his client or is enhancing his own credibility as advocate by virtue of having taken an oath as witness, as well as the uneasy situation that arises when an opposing counsel must impeach on cross-examination another lawyer-adversary. *Id.*

The rationale behind Canon 5, as applied to the facts of this litigation, does not persuade the court that disqualification of Mr. McGee and the firm of Williamson, McGee, Griggs and DeMoss is required.

The court finds no factual support for defendant's claim that Disciplinary Rule 5-102(B) compels disqualification, and declines to embrace defendant's "appearance of impropriety" argument under Disciplinary Rule 9-101. Nor does the court find it necessary to determine whether Andrea Ramsay has or has not acted as one of the counsel of record for plaintiff in light her assurance to this court that she is not representing plaintiff in this action and will not be involved in any trial of this matter as an attorney. (Dk. # 35, p. 3.)

IT IS THEREFORE ORDERED that defendant's motion for disqualification of plaintiff's counsel is granted to the extent that Andrea Ramsay shall not participate as an attorney in the practice of her profession in the future course of this litigation.

IT IS FURTHER ORDERED that defendant's motion for disqualification of plaintiff's counsel is denied to the extent that it seeks to disqualify John F. McGee and the law firm of Williamson, McGee, Griggs and DeMoss from further participation in this lawsuit.



Jacque BUNTING, as Personal
Representative of the Estate
of Harold Dierich, Plaintiff,

v.

UNITED STATES of America,
Defendant.

No. A85-665 Civil.

United States District Court,
D. Alaska.

July 2, 1987.

In action brought against Coast Guard pursuant to the Federal Tort Claims Act, both plaintiff and Government moved for summary judgment. The District Court, von der Heydt, J., held that: (1) state tort law determines standard of care applicable to Coast Guard's actions; (2) under Alaska's "good Samaritan" statute, partial immunity applies only to persons who had no preexisting duty to render aid; (3) question of whether Coast Guard had duty to render aid is not question of state law, as state law controls only question of whether Coast Guard may be liable if such duty existed but was carried out in negligent manner; (4) plaintiff could not maintain ordinary negligence claim against Coast Guard, which had no legal obligation to go

to pilot's aid, but could maintain action based upon gross negligence or reckless or intentional misconduct.

Ordered accordingly.

1. United States \Rightarrow 78(14)

In order to determine standard of care applicable to Coast Guard's actions in negligence action against Government pursuant to Tort Claims Act, court must look to state tort law. 28 U.S.C.A. §§ 1346, 2674.

2. Negligence \Rightarrow 8

Alaska's "good Samaritan" statute provides partial immunity only to persons who had no preexisting duty to render aid to injured, ill, or emotionally distraught person. AS 09.65.090.

3. United States \Rightarrow 78(14)

In action against Coast Guard pursuant to Federal Tort Claims Act, question of whether Coast Guard had duty to render aid is not question of state law; state law controlled only question of whether Coast Guard may be liable if such duty existed but was carried out in negligent manner. 28 U.S.C.A. §§ 1346, 2671 et seq.

4. United States \Rightarrow 78(7)

Pursuant to federal law, Coast Guard has no legal duty to render aid to persons in distress. 14 U.S.C.A. §§ 2, 88.

5. United States \Rightarrow 78(9)

Tort action against Coast Guard alleging negligence in rescue of pilot could not be maintained pursuant to Alaska's "good Samaritan" statute, where Coast Guard had no legal obligation to go to pilot's aid; however, Coast Guard would be liable for gross negligence or reckless or intentional misconduct. 28 U.S.C.A. § 2674.

Lewis F. Gordon, Bailly & Mason, Anchorage, Alaska, for plaintiff.

Mark A. Rosenbaum, Asst. U.S. Atty., Anchorage, Alaska, for defendant.

1. Because no maritime tort has been alleged, this action is unlike many suits arising out of Coast Guard rescues. It is not covered by the Suits in Admiralty Act, 46 U.S.C. § 741 et seq.

MEMORANDUM AND ORDER

VON DER HEYDT, District Judge.

This matter is before the court on the parties' cross-motions for partial summary judgment. Both parties seek a determination of the standard of care to be applied in this case. The facts relevant to this determination are not in dispute.

Harold Dierich, Jr., plaintiff's deceased was the pilot of a plane that crashed in Narrow Strait, near Kodiak, on July 21, 1984. A Coast Guard helicopter rescued him about an hour and a half later and carried him to the Coast Guard dispensary at Kodiak. The dispensary is a facility that exists primarily for the treatment of Coast Guard personnel. Upon arrival at the dispensary Mr. Dierich appeared to be suffering from severe hypothermia. After about ninety minutes of treatment at the dispensary, he was transported by ambulance to Kodiak Island Hospital. He went into cardiac arrest in the ambulance and subsequently died at the hospital.

Count I of the Second Amended Complaint alleges that the treatment at the dispensary was negligent, and that the handling of transport to a more capable facility was likewise negligent. Count II alleges that these operations were handled in a grossly negligent manner. The alleged torts took place on land. This action has been brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

[1] The Tort Claims Act renders the government liable "in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674. The court therefore must look to state tort law to determine the standard of care applicable to the Coast Guard's actions.

[2] At common law there normally was no duty to render emergency aid, but one who voluntarily undertook such aid was held to a standard of ordinary care. To reduce the risk of liability for such a

(*cf.* 28 U.S.C. § 2680(d)), and the federal common law of maritime torts does not apply. See *Patentas v. United States*, 687 F.2d 707, 713 (3d Cir.1982).

unteer, Alaska has adopted a "good Samaritan" statute, A.S. 09.65.090, which reads:

Civil liability for emergency aid. (a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

(b) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct.

The Supreme Court of Alaska has held that the partial immunity granted by this statute applies only to persons who had no pre-existing duty to render aid. *Lee v. State*, 490 P.2d 1206, 1209 (Alaska 1971) (good Samaritan statute did not shield police officer who shot child while rescuing child from lioness, because officer had legal duty to attempt rescue), *overruled on other grounds*, 545 P.2d 165 (Alaska 1976).

The chief question presented by this case is whether the Coast Guard had a pre-existing duty to go to Mr. Dierich's aid. Plaintiff relies again on *Lee v. State*, analogizing the position of the Coast Guard to that of the policeman in *Lee*. The Alaska Supreme Court found that the policeman had a state common law duty to rescue growing out of custom and public expectation. *Id.* at 1209-10. The court also suggested that such a duty might be drawn from certain state statutes relating to the Department of Public Safety. *Id.*

[3,4] Reliance on *Lee* is misplaced in this context. The question whether the Coast Guard has a duty to render aid is not a question of state law; state law controls only the question whether the Coast Guard may be liable if such a duty exists but has been carried out in a negligent manner. Federal statutes, notably 14 U.S.C. §§ 2 and 88, establish the activities that the Coast Guard is required to perform. While the issue has not been decided in this circuit, out-of-circuit authority uniformly

holds that the Coast Guard has no legal duty to render aid to persons in distress. *E.g., Frank v. United States*, 250 F.2d 178 (3d Cir.1957), *cert. denied*, 356 U.S. 962, 78 S.Ct. 1000, 2 L.Ed.2d 1069 (1958); *Kurowsky v. United States*, 660 F.Supp. 442, 1987 A.M.C. 781, 792 (S.D.N.Y.1986); *Daley v. United States*, 499 F.Supp. 1005, 1009 (D.Mass.1980); *Mazullo v. United States*, 1980 A.M.C. 1038, 1044-47 (D.D.C.1979) (citing many cases). This court agrees.

Plaintiff observes that many of these cases have gone on to hold that if the Coast Guard does elect to undertake a rescue, its subsequent conduct will, at least in certain circumstances, be judged by a standard of ordinary care. *E.g., Kurowsky, supra; Daley, supra*, 499 F.Supp. at 1010; *United States v. DeVane*, 306 F.2d 182, 186 (5th Cir.1962). But these cases were decided under traditional common law principles, in the absence of a protective good Samaritan statute.

[5] By statute, Alaska has partially immunized the conduct of one who, voluntarily and without prior obligation, renders emergency aid. The Coast Guard had no legal obligation to go to Mr. Dierich's aid. The court cannot hold the Coast Guard to a higher standard of care than would be applied to a private individual under like circumstances. 28 U.S.C. § 2674. Here the position of the Coast Guard is analogous to that of a private company operating a helicopter service and a clinic for its employees. If such a company rescued a downed pilot and brought him to the employee clinic for emergency treatment, the company's liability would be limited to gross negligence or reckless or intentional misconduct. Because the Coast Guard's conduct must be judged on the same basis, the count of plaintiff's complaint based on ordinary negligence must be dismissed.

Accordingly, IT IS ORDERED:

(1) THAT defendant's motion for partial summary judgment (Docket No. 47) is granted;

(2) THAT Count I of plaintiff's Second Amended Complaint is dismissed;

(3) THAT plaintiff's motion for partial summary judgment (Docket No. 64) is denied.

Anthony J. DiFlippo, Fleming, O'Byrne & Fleming, Fort Lauderdale, Fla., for defendants Golden Beach and Neiman.

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the court upon the petition for removal, filed by the defendants, City of Golden Beach and Robert Neiman. The plaintiffs have sued the defendants, City of Golden Beach, Robert Neiman, Trafalgar Towers Association, Inc., and Trafalgar Towers Association, #2, Inc., for damages sustained by the plaintiffs' decedent.

The plaintiffs allege that the City's employee, Robert Neiman acted negligently operating a City vehicle while within the scope of his employment as a police officer with the City of Golden Beach. This negligence is alleged to have resulted in the death of the plaintiffs' decedent, Stephan Duncan. Allegedly, the defendant, Neiman, "engaged in a high speed chase of a vehicle being driven by Stephanie Duncan[,] ran his motor vehicle into the rear of the vehicle being driven by Stephanie Duncan and forced the vehicle off the roadway." Plaintiffs' First Amended Complaint at ¶ 11.

The plaintiffs further allege that the vehicle "struck a guardrail ... and fell into the intercoastal [sic] waterway." Plaintiffs' First Amended Complaint at ¶ 12. According to the plaintiffs' allegation the defendant, Neiman, tried but failed to save Ms. Duncan. Ms. Duncan was apparently rescued through some other means, but died four days after the accident. The plaintiffs assert that the police officer, defendant, Neiman, was not trained by the City in water rescue. The plaintiffs have sued the City and Robert Neiman for negligence and have sued the defendants for damages resulting from violations of U.S.C. § 1983.

The defendants, Trafalgar Towers Association, Inc., and Trafalgar Towers Association, #2, Inc., are allegedly the parties who placed the guardrail along the road where the accident occurred. The plaintiffs assert that the guardrail was negligently



Michael DUNCAN etc., et al., Plaintiffs,

v.

CITY OF GOLDEN BEACH, etc., et al., Defendants.

No. 87-6375-CIV-GONZALEZ.

United States District Court,
S.D. Florida, N.D.

July 6, 1987.

On petition to remove § 1983 claims in action arising out of death of motorist in high speed chase, the District Court, Gonzalez, J., held that claims were not removable, as separate and independent.

Petition denied and cause remanded.

Removal of Cases § 1983

Section 1983 claims against city and its police officer arising out of death of motorist in high speed chase were not removable, as separate and independent from claims against parties who placed guardrail along road where accident occurred, where complaint sought recovery for only one wrong, alleged to have occurred as a result of an "interlocking series of transactions," involving primarily the same facts. 28 U.S.C.A. § 1441(c).

Jack L. Herskowitz, Miami, Fla., for plaintiffs.

TITLE 26
INTERNAL REVENUE CODE
SUBTITLE A—INCOME TAXES—Continued
CHAPTER 1—NORMAL TAXES AND SURTAXES—Continued
SUBCHAPTER F—EXEMPT ORGANIZATIONS

<p>Part</p> <p>I. General rule.</p> <p>II. Private foundations.</p> <p>III. Taxation of business income of certain exempt organizations.</p>	<p>Part</p> <p>IV. Farmers' cooperatives.</p> <p>V. Shipowners' protection and indemnity associations.</p> <p>VI. Political organizations.</p> <p>VII. Certain homeowners associations.</p>
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1976 Amendment. Pub.L. 94-455, Title XXI, § 2101(d), Oct. 4, 1976, 90 Stat. 1899, added part VII heading.

1975 Amendment. Pub.L. 93-625, § 10(d), Jan. 3, 1975, 88 Stat. 2119, added part VI heading.

1969 Amendment. Pub.L. 91-172, Title I, § 101(j) (58), Dec. 30, 1969, 83 Stat. 532, added part II heading, and redesignated former parts II, III and IV as parts III, IV and V, respectively.

PART I—GENERAL RULE

<p>Sec.</p> <p>501. Exemption from tax on corporations, certain trusts, etc.</p> <p>502. Feeder organizations.</p> <p>503. Requirements for exemption.</p> <p>504. Status after organization ceases to qualify for exemption under sec-</p>	<p>Sec.</p> <p>tion 501(c) (3) because of substantial lobbying.</p> <p>505. Additional requirements for organizations described in paragraph (9), (17), or (20) of section 501(c).</p>
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1984 Amendment. Pub.L. 98-369, Title V, § 513(b), July 18, 1984, 98 Stat. 865, added item 505, applicable to years beginning after Dec. 31, 1984.

1976 Amendment. Pub.L. 94-455, Title XIII, § 1307(d) (3) (B), Oct. 4, 1976, 90 Stat. 1728, added item 504.

1969 Amendment. Pub.L. 91-172, Title I, § 101(j) (61), Dec. 30, 1969, 83 Stat. 532, struck out item relating to section 504.

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) **Exemption from taxation.**—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) **Tax on unrelated business income and certain other activities.**—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III, and VI of this subchapter, but (notwithstanding parts II, III, and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) **List of exempt organizations.**—The following organizations are referred to in subsection (a):

(1) any¹ corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

(A) is exempt from Federal income taxes—

(i) under such Act as amended and supplemented before July 18, 1984, or

(ii) under this title without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act, or

(B) is described in subsection (I).

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(5) Labor, agricultural, or horticultural organizations.

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.

(8) Fraternal beneficiary societies, orders, or associations—

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(11) Teachers' retirement fund associations of a purely local character, if—

(A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

(B) the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

(12)(A) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists

of amounts collected from members for the expenses.

(B) In the case of a mutual or cooperative (A) shall be applied without taking into account—

(i) from a nonmember telephone communication services which involve membership in a telephone company,

(ii) from qualified pole rentals, or

(iii) from the sale of display listings to members of the mutual or cooperative.

(C) In the case of a mutual or cooperative shall be applied without taking into account from qualified pole rentals.

(D) For purposes of this paragraph, the any rental of a pole (or other structure used for other structure)—

(i) is used by a telephone or electric wires which are used by such company for services to its members, and

(ii) is used pursuant to the rental addition to the wires described in clause transmission by wire of electricity or of

For purposes of the preceding sentence, the the right to use the pole (or other structure

(13) Cemetery companies owned and operated by their members or which are not operated exclusively for the purpose of the disposition of human remains which is not permitted by its charter to engage in any other business, incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(14)(A) Credit unions without capital stock and without profit.

(B) Corporations or associations without capital stock, organized before September 1, 1957, and operated for mutual purposes of providing reserve funds for, and

(i) domestic building and loan associations,

(ii) cooperative banks without capital stock for mutual purposes and without profit,

(iii) mutual savings banks not having shares, or

(iv) mutual savings banks described in

(C) Corporations or associations organized and operated for mutual purposes and without reserve funds for associations or banks (other than as described in subparagraph (B)); but only if 85 percent or more of the net earnings are provided for such reserve funds and to invest in any other corporation or association (other than as described in subparagraph (B)).

(15)(A) Insurance companies or associations (other than reciprocal underwriters) if the net earnings (other than direct written premiums) for the taxable year

(B) For purposes of subparagraph (A), if an association is described in subparagraph (A), all such amounts shall be treated as received during the taxable year in which they are received by the association which are members of the association or association for which the det

(C) For purposes of subparagraph (B), the meaning given such term by section 831(b)

(16) Corporations organized by an association, or members thereof, for the p

of amounts collected from members for the sole purpose of meeting losses and expenses.

(B) In the case of a mutual or cooperative telephone company, subparagraph (A) shall be applied without taking into account any income received or accrued—

(i) from a nonmember telephone company for the performance of communication services which involve members of the mutual or cooperative telephone company,

(ii) from qualified pole rentals, or

(iii) from the sale of display listings in a directory furnished to the members of the mutual or cooperative telephone company.

(C) In the case of a mutual or cooperative electric company, subparagraph (A) shall be applied without taking into account any income received or accrued from qualified pole rentals.

(D) For purposes of this paragraph, the term "qualified pole rental" means any rental of a pole (or other structure used to support wires) if such pole (or other structure)—

(i) is used by the telephone or electric company to support one or more wires which are used by such company in providing telephone or electric services to its members, and

(ii) is used pursuant to the rental to support one or more wires (in addition to the wires described in clause (i)) for use in connection with the transmission by wire of electricity or of telephone or other communications.

For purposes of the preceding sentence, the term "rental" includes any sale of the right to use the pole (or other structure).

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(14)(A) Credit unions without capital stock organized and operated for mutual purposes and without profit.

(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of, shares or deposits in—

(i) domestic building and loan associations,

(ii) cooperative banks without capital stock organized and operated for mutual purposes and without profit,

(iii) mutual savings banks not having capital stock represented by shares, or

(iv) mutual savings banks described in section 591(b)

(C) Corporations or associations organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for associations or banks described in clause (i), (ii), or (iii) of subparagraph (B); but only if 85 percent or more of the income is attributable to providing such reserve funds and to investments. This subparagraph shall not apply to any corporation or association entitled to exemption under subparagraph (B).

(15)(A) Insurance companies or associations other than life (including interinsurers and reciprocal underwriters) if the net written premiums (or, if greater, direct written premiums) for the taxable year do not exceed \$350,000.

(B) For purposes of subparagraph (A), in determining whether any company or association is described in subparagraph (A), such company or association shall be treated as receiving during the taxable year amounts described in subparagraph (A) which are received during such year by all other companies or associations which are members of the same controlled group as the insurance company or association for which the determination is being made.

(C) For purposes of subparagraph (B), the term "controlled group" has the meaning given such term by section 831(b)(2)(B)(ii).

(16) Corporations organized by an association subject to part IV of this subchapter or members thereof, for the purpose of financing the ordinary crop

operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, on dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

(17)(A) A trust or trusts forming part of a plan providing for the payment of supplemental unemployment compensation benefits, if—

(i) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of supplemental unemployment compensation benefits,

(ii) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated employees (within the meaning of section 414(q)), and

(iii) such benefits do not discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)). A plan shall not be considered discriminatory within the meaning of this clause merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan.

(B) In determining whether a plan meets the requirements of subparagraph (A), any benefits provided under any other plan shall not be taken into consideration, except that a plan shall not be considered discriminatory—

(i) merely because the benefits under the plan which are first determined in a nondiscriminatory manner within the meaning of subparagraph (A) are then reduced by any sick, accident, or unemployment compensation benefits received under State or Federal law (or reduced by a portion of such benefits if determined in a nondiscriminatory manner), or

(ii) merely because the plan provides only for employees who are not eligible to receive sick, accident, or unemployment compensation benefits under State or Federal law the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such laws if such employees were eligible for such benefits, or

(iii) merely because the plan provides only for employees who are not eligible under another plan (which meets the requirements of subparagraph (A)) of supplemental unemployment compensation benefits provided wholly by the employer the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such other plan if such employees were eligible under such other plan, but only if the employees eligible under both plans would make a classification which would be nondiscriminatory within the meaning of subparagraph (A).

(C) A plan shall be considered to meet the requirements of subparagraph (A) during the whole of any year of the plan if on one day in each quarter it satisfies such requirements.

(D) The term "supplemental unemployment compensation benefits" means only—

(i) benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, and

(ii) sick and accident benefits subordinate to the benefits described in clause (i).

(E) Exemption shall not be denied under as entitled to such exemption as an association or subsection merely because such organization supplemental unemployment benefits (as defined).

(18) A trust or trusts created before June 1, 1958, providing for the payment of benefits under contributions of employees, if—

(A) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of supplemental unemployment compensation benefits,

(B) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated employees (within the meaning of section 414(q)), and

(C) such benefits do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)). A plan shall not be considered discriminatory within the meaning of this clause merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan.

(D) in the case of a plan under which contributions are deductible—

(i) such contributions do not exceed the amount which a deduction is allowable under section 401(k)(3)(A)(ii) are met with respect to such contributions,

(ii) requirements similar to those of section 401(k)(3)(A)(ii) are met with respect to such contributions, and

(iii) such contributions are treated as contributions under section 402(g) (other than paragraph (2)).

For purposes of subparagraph (D)(ii), rules 1.401(k)-8 shall apply. For purposes of section 401(k)(3)(A)(ii) shall be treated as an elective deferral arrangement.

(19) A post or organization of past or present members of the United States, or an auxiliary unit or service organization, if—

(A) organized in the United States or

(B) at least 75 percent of the members of the organization are members of the Armed Forces of the United States, or the other members of which are individuals who are widows, or widowers of past or present members of the United States or of cadets, and

(C) no part of the net earnings of the organization is in the hands of any private shareholder or individual.

(20) an organization or trust created or organized for the exclusive function of which is to form part of a plan or plans, within the meaning of section 401(k)(3)(A)(ii) which receives contributions because of section 401(k)(3)(A)(ii) which is excluded from qualifying as an organization described in section 401(k)(3)(A)(ii) because it provides legal services or indemnity services unassociated with a qualified group-term life insurance plan.

(21) A trust or trusts established in the United States, and contributed to by any person, if—

(A) the purpose of such trust or trusts is

(i) to satisfy, in whole or in part, with respect to, claims for compensation for pneumoconiosis under Black Lung Act,

(ii) to pay premiums for insurance, and

(iii) to pay administrative and other expenses (including legal, accounting, actuarial, and other expenses).

(E) Exemption shall not be denied under subsection (a) to any organization entitled to such exemption as an association described in paragraph (9) of this subsection merely because such organization provides for the payment of supplemental unemployment benefits (as defined in subparagraph (D)(ii)).

(18) A trust or trusts created before June 25, 1959, forming part of a plan providing for the payment of benefits under a pension plan funded only by contributions of employees, if—

(A) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of benefits under the plan,

(B) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated employees (within the meaning of section 414(q)),

(C) such benefits do not discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)). A plan shall not be considered discriminatory within the meaning of this subparagraph merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan, and

(D) in the case of a plan under which an employee may designate certain contributions as deductible—

(i) such contributions do not exceed the amount with respect to which a deduction is allowable under section 219(b)(3),

(ii) requirements similar to the requirements of section 401(k)(3)(A)(ii) are met with respect to such elective contributions, and

(iii) such contributions are treated as elective deferrals for purposes of section 402(g) (other than paragraph (4) thereof).

For purposes of subparagraph (D)(ii), rules similar to the rules of section 401(k)(8) shall apply. For purposes of section 4979, any excess contribution under clause (ii) shall be treated as an excess contribution under a cash or deferred arrangement.

(19) A post or organization of past or present members of the Armed Forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions,

(B) at least 75 percent of the members of which are past or present members of the Armed Forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows, or widowers of past or present members of the Armed Forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(20) an organization or trust created or organized in the United States, the exclusive function of which is to form part of a qualified group legal services plan or plans, within the meaning of section 120. An organization or trust which receives contributions because of section 120(c)(5)(C) shall not be prevented from qualifying as an organization described in this paragraph merely because it provides legal services or indemnification against the cost of legal services unassociated with a qualified group legal services plan.

(21) A trust or trusts established in writing, created or organized in the United States, and contributed to by any person (except an insurance company) if—

(A) the purpose of such trust or trusts is exclusively—

(i) to satisfy, in whole or in part, the liability of such person for, or with respect to, claims for compensation for disability or death due to pneumoconiosis under Black Lung Acts;

(ii) to pay premiums for insurance exclusively covering such liability; and

(iii) to pay administrative and other incidental expenses of such trust (including legal, accounting, actuarial, and trustee expenses) in connec-

tion with the operation of the trust and the processing of claims against such person under Black Lung Acts; and

(B) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(i) the purposes described in subparagraph (A), or

(ii) investment (but only to the extent that the trustee determines that a portion of the assets is not currently needed for the purposes described in subparagraph (A)) in—

(I) public debt securities of the United States,

(II) obligations of a State or local government which are not in default as to principal or interest, or

(III) time or demand deposits in a bank (as defined in section 581) or an insured credit union (within the meaning of section 101(6) of the Federal Credit Union Act, 12 U.S.C. 1752(6)) located in the United States, or

(iii) payment into the Black Lung Disability Trust Fund established under section 9501, or into the general fund of the United States Treasury (other than in satisfaction of any tax or other civil or criminal liability of the person who established or contributed to the trust).

For purposes of this paragraph the term "Black Lung Acts" means part C of title IV of the Federal Mine Safety and Health Act of 1977, and any State law providing compensation for disability or death due to pneumoconiosis.

(22) A trust created or organized in the United States and established in writing by the plan sponsors of multiemployer plans if—

(A) the purpose of such trust is exclusively—

(i) to pay any amount described in section 4223(c) or (h) of the Employee Retirement Income Security Act of 1974, and

(ii) to pay reasonable and necessary administrative expenses in connection with the establishment and operation of the trust and the processing of claims against the trust,

(B) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(i) the purposes described in subparagraph (A), or

(ii) the investment in securities, obligations, or time or demand deposits described in clause (ii) of paragraph (21)(B),

(C) such trust meets the requirements of paragraphs (2), (3), and (4) of section 4223(b), 4223(h), or, if applicable, section 4223(c) of the Employee Retirement Income Security Act of 1974, and

(D) the trust instrument provides that, on dissolution of the trust, assets of the trust may not be paid other than to plans which have participated in the plan or, in the case of a trust established under section 4223(h) of such Act, to plans with respect to which employers have participated in the fund.

(23) any association organized before 1880 more than 75 percent of the members of which are present or past members of the Armed Forces and a principal purpose of which is to provide insurance and other benefits to veterans or their dependents.

(24) A trust described in section 4049 of the Employee Retirement Income Security Act of 1974 (as in effect on the date of the enactment of the Single-Employer Pension Plan Amendments Act of 1986).

(25)(A) Any corporation or trust which—

(i) has no more than 35 shareholders or beneficiaries,

(ii) has only 1 class of stock or beneficial interest, and

(iii) is organized for the exclusive purposes of—

(I) acquiring real property and holding title to, and collecting income from, such property, and

(II) remitting the entire amount of income from such property (less expenses) to 1 or more organizations described in subparagraph (C) which are shareholders of such corporation or beneficiaries of such trust.

(B) A corporation or trust shall be determined with regard to whether the corporation or trust is described in subparagraph (C).

(C) An organization is described in this subsection if—

(i) a qualified pension, profit-sharing, or annuity plan (within the requirements of section 401(a))

(ii) a governmental plan (within the requirements of section 408(a))

(iii) the United States, any State, or any agency or instrumentality of the United States

(iv) any organization described in subsection (d)

(v) any organization described in subsection (e)

(D) A corporation or trust described in this subsection shall be treated as a shareholder or beneficiary—

(i) to dismiss the corporation's or trust's reasonable notice, upon a vote of the shareholders or beneficiaries holding a majority of interest in the corporation or trust

(ii) to terminate their interest in the trust, if both of the following alternative conditions are met:

(I) by selling or exchanging their interest in the trust (subject to any organization described in this subsection) for a sale or exchange does not in the gross income their entire pro rata share of the taxable income of the association or corporation included in the gross income of a member of the association or corporation

(II) by having their stock or interest in the trust after the shareholders or beneficiaries give 60 days notice to such corporation or trust

(d) Religious and apostolic organizations. Religious or apostolic associations or corporations have a common trust or fund, and such associations or corporations engage in business with their members, but only if the members thereof included in their gross income their entire pro rata share of the taxable income of the association or corporation included in the gross income of a member of the association or corporation

(e) Cooperative hospital service organization. A cooperative hospital service organization shall be treated as an organization described in this subsection for charitable purposes, if—

(1) such organization is organized and operated for the following purposes:—

(A) to perform, on a centralized basis, services which, if performed on its own, would constitute activities in the nature of a business, including, purchasing, warehousing, billing, engineering, laboratory, printing, and other services; and

(B) to perform such services solely for the benefit of the community which is—

(i) an organization described in subsection (d)

(ii) a constituent part of an organization which is exempt from taxation under subsection (d) and operated as a cooperative organization described in subsection (d)

(iii) owned and operated by the community, or a possession of the community, or an agency or instrumentality of the community

(2) such organization is organized and operated so that it allocates or pays, within 8 1/2 months after the end of the taxable year, earnings to patrons on the basis of services rendered to patrons during the taxable year

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(B) A corporation or trust shall be described in subparagraph (A) without regard to whether the corporation or trust is organized by 1 or more organizations described in subparagraph (C).

(C) An organization is described in this subparagraph if such organization is—

(i) a qualified pension, profit sharing, or stock bonus plan that meets the requirements of section 401(a),

(ii) a governmental plan (within the meaning of section 414(d)),

(iii) the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing,

(iv) any organization described in paragraph (3), or

(v) any organization described in this paragraph.

(D) A corporation or trust described in this paragraph must permit its shareholders or beneficiaries—

(i) to dismiss the corporation's or trust's investment adviser, following reasonable notice, upon a vote of the shareholders or beneficiaries holding a majority of interest in the corporation or trust, and

(ii) to terminate their interest in the corporation or trust by either, or both, of the following alternatives, as determined by the corporation or trust:

(I) by selling or exchanging their stock in the corporation or interest in the trust (subject to any Federal or State securities law) to any organization described in subparagraph (C) so long as the sale or exchange does not increase the number of shareholders or beneficiaries in such corporation or trust above 35, or

(II) by having their stock or interest redeemed by the corporation or trust after the shareholder or beneficiary has provided 90 days notice to such corporation or trust.

(d) Religious and apostolic organizations.—The following organizations are referred to in subsection (a): Religious or apostolic associations or corporations, if such associations or corporations have a common treasury or community treasury, even if such associations or corporations engage in business for the common benefit of the members, but only if the members thereof include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the taxable income of the association or corporation for such year. Any amount so included in the gross income of a member shall be treated as a dividend received.

(e) Cooperative hospital service organizations.—For purposes of this title, an organization shall be treated as an organization organized and operated exclusively for charitable purposes, if—

(1) such organization is organized and operated solely—

(A) to perform, on a centralized basis, one or more of the following services which, if performed on its own behalf by a hospital which is an organization described in subsection (c)(3) and exempt from taxation under subsection (a), would constitute activities in exercising or performing the purpose or function constituting the basis for its exemption: data processing, purchasing, warehousing, billing and collection, food, clinical, industrial engineering, laboratory, printing, communications, record center, and personnel (including selection, testing, training, and education of personnel) services; and

(B) to perform such services solely for two or more hospitals each of which is—

(i) an organization described in subsection (c)(3) which is exempt from taxation under subsection (a),

(ii) a constituent part of an organization described in subsection (c)(3) which is exempt from taxation under subsection (a) and which, if organized and operated as a separate entity, would constitute an organization described in subsection (c)(3), or

(iii) owned and operated by the United States, a State, the District of Columbia, or a possession of the United States, or a political subdivision or an agency or instrumentality of any of the foregoing;

(2) such organization is organized and operated on a cooperative basis and allocates or pays, within 8½ months after the close of its taxable year, all net earnings to patrons on the basis of services performed for them; and

Valdez, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

When there was no evidence before the superior court suggesting that a city's warning of safety hazards was issued with a knowing or reckless disregard for the truth of the statements if contained that communication was protected by a privilege extended to administrative officers making defamatory communications required or permitted in the performance of official duties even though there was no immunity under this section. *Urethano Specialties, Inc. v. City of Valdez*, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

City's failure to follow own rules governing relations with employees. — This section does not immunize city from liability for damages resulting from its failure to follow its own rules governing its relations with its employees. *Stanfill v. City of Fairbanks*, Sup. Ct. Op. No. 2624 (File No. 6321), P.2d (1983).

Negligence in operation of ambulance. — The object to be accomplished by ambulance service operated and main-

tained by a city, that of service to the infirm, was so closely related to hospitalization benefits that it could be said to come within the scope of the opinion in *Tueggel v. City of Sitka*, 118 F. Supp. 399 (D. Alaska, 1954), *aff'd*, 245 F.2d 61 (9th Cir. 1957), and the city could be held liable for any negligence in the operation of the ambulance. *Lucas v. City of Juneau*, 168 F. Supp. 195 (D. Alaska, 1958).

Negligence of fire department. — For case decided prior to second 1975 amendment holding that a city which maintained a fire department could be held liable for injuries resulting from negligence connected with the department's firefighting activities, see *City of Fairbanks v. Shaible*, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962). See *contra*: *City of Fairbanks v. Gilbertson*, 16 Alaska 590 (1957), *aff'd*, 262 F.2d 734 (9th Cir. 1959), where § 56-2-2 ACCLA 1949 (predecessor to this section) was ignored by both the district court and the court of appeals.

Quoted in *Atkinson v. Haldane*, Sup. Ct. Op. No. 1495 (File No. 2981), 569 P.2d 151 (1977).

Collateral references. — Fire departments as pertaining to the governmental or to the proprietary branch of municipality, 9 ALR 143; 33 ALR 688; 84 ALR 514.

Necessity of consent to suit against state, 42 ALR 1464; 50 ALR 1408.

Municipal immunity from liability for torts, 120 ALR 1376; 60 ALR2d 1198.

Sec. 09.65.080. Suits by incorporated units of local government. An action may be maintained by an incorporated borough, city, or other public corporation of like character in its corporate name, and upon a cause of action accruing to it in its corporate character

- (1) upon a contract made with the public corporation;
- (2) upon a liability prescribed by law in favor of the public corporation;
- (3) to recover a penalty or forfeiture given to the public corporation;
- (4) to recover damages for an injury to the corporate rights or property of the public corporation. (§ 2 ch 23 SLA 1964)

Sec. 09.65.090. Civil liability for emergency aid. (a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

(b) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct. (§ 1 ch 32 SLA 1967; am § 1 ch 119 SLA 1971; am § 38 ch 102 SLA 1976)

NOTES TO DECISIONS

Common law. — At common law there is no duty to rescue. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

The law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger. Only in certain limited situations, as for example where the actor was responsible for placing the imperiled person in his endangered position, has a duty been recognized. However, once rescue operations have begun, the rescuer is held to a duty of due care. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

The purpose of this section is to induce voluntary rescue by removing the fear of potential liability which acts as an impediment to such rescue. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

This section is directed at persons who are not under some preexisting

duty to rescue. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

A rescuer under a preexisting duty to rescue would not need the added inducement of immunity from civil liability for his ordinary negligence. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

Such as a police officer. — A holding that police officers have no duty to rescue would not comport with public conceptions of their role. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

This section, the Alaska Good Samaritan statute, does not shield a police officer from liability for ordinary negligence. *Lee v. State*, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, *Munroe v. City Council*, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

Sec. 09.65.092. Civil liability for voluntary aircraft safety inspection. An aircraft or power plant technician or mechanic certified by the Federal Aviation Administration who participates without compensation in a voluntary aircraft safety inspection program is not liable for civil damage resulting from an act or omission arising out of an aircraft safety inspection in that program unless the act or omission constitutes gross negligence or reckless or intentional misconduct. (§ 1 ch 3 SLA 1982)

Sec. 09.65.095. Liability for administration of blood test. (a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

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February 17, 1988

*ALASKA AND DISTRICT OF COLUMBIA BARS
**WISCONSIN BAR
ALL OTHERS DISTRICT OF COLUMBIA BAR

Honorable Chairman John Sund
House Committee on Judiciary
State Capitol Bldg.
P. O. Box V (Mail Stop 3100)
Juneau, AK 99811

Re: Good Samaritan Law Amendments
(Our File No. 911.21)

Dear Chairman Sund:

We write on behalf of the Alaska Native Health Board and the Association of Regional Health Directors to comment on H.B. 340, a bill granting immunity from civil liability for individuals providing volunteer emergency services. This bill would amend AS 09.65.090 by adding a new subsection to Alaska's existing "Good Samaritan" statute.

The Good Samaritan statute promotes an important public policy by encouraging citizens (whether trained professionals or lay persons) to provide medical assistance to people suffering a medical emergency. The statute is particularly important given the ever-increasing tendency to turn to the courts to resolve all problems. While we believe that the protection of volunteers (addressed in the bill) is laudable, we also think the Committee should take this opportunity to address two additional serious health care issues in this area: (1) the liability of "Community Health Aides" providing emergency medical services, and (2) the liability of all persons who have a pre-existing duty to provide emergency services. We discuss these issues below.

Community Health Aides are the backbone of the health care delivery system throughout rural Alaska. In most villages, they are the only health care provider available in emergencies. As a consequence, Community Health Aides across the State feel a special obligation to assist those in need, especially those in

Honorable Chairman Sund
February 17, 1988
Page 2

need of emergency services, and to do so with whatever training and limited resources they may have.

Community Health Aides have a growing fear that as personal injury tort litigation reaches further into rural Alaska, they will soon be faced with lawsuits. Indeed, this trend has already begun. The Health Aides are particularly concerned about their potential exposure when they administer emergency medical care under circumstances where decisions and actions must be taken immediately, guidance from a physician is unavailable, and a person's life is at stake.

Title 11 currently sets forth general protection for individuals who provide emergency care without first receiving the patient's consent (as where the person is unconscious or otherwise unable to give consent) (AS 11.81.430(a)(5)(B)). The more important statute, however is the section now under scrutiny by this Committee, AS 09.65.090 (emphasis added):

(A) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill or emotionally distraught person who reasonable appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering aid.

(B) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct.

On its face, Section 90 would appear to include Community Health Aides within its scope. Clearly a Community Health Aide would be a "person at a hospital or any other location who renders emergency care" In 1971, however, the Alaska Supreme Court construed an earlier version of Section 90 to exclude from coverage any person with a "pre-existing duty" to render aid. Lee v. State, 490 P.2d 1206 (Alaska 1971), overruled in part on other grounds, 545 P.2d 165 (Alaska 1976). A Community Health Aide acting in his or her capacity as a Health Aide would apparently have a pre-existing duty, and under Lee would not be shielded from suit.

The earlier statute construed by the Court in Lee covered "[a] person who, without expecting compensation, renders care to an injured or sick person" AS 09.65.090 (1968). Amendment of the law in 1976 to broaden the scope of coverage to "[a] person at a hospital or other location..." reflected the Legislature's intent to include persons with a pre-existing duty

Honorable Chairman Sund
February 17, 1988
Page 3

(such as nurses and doctors in a hospital emergency). The legislative history to the 1976 amendment confirms this point. Despite the Legislature's effort, the courts continue to exclude "pre-existing duty" persons from Alaska's Good Samaritan statute, as demonstrated in a very recent decision from the federal district court in Alaska. See Bunting v. United States, 662 F.Supp. 971, 973 (D.Alaska 1987). For this reason, it is clear that Section 90 requires further amendment.

We note that Alaska has adopted a separate "good samaritan" statute to specifically protect emergency medical technicians (See AS 18.08.086(a)). This statute was amended in 1986 to broaden its scope to cover emergencies posing risks of serious harm (in addition to risks of death). As we understand it, much of the genesis for this statute and its 1986 amendment was concern over increasing tort litigation arising out of emergency situations where snap decisions must be made in order to save a person's life. The increased risk of litigation has in turn driven up insurance rates astronomically in recent years for emergency medical technicians, an additional strong incentive for this law and its 1986 amendment.

The situation with Community Health Aides is even more compelling than with emergency medical technicians and, we believe, justifies identical treatment by the Alaska Legislature. Specifically, Community Health Aides are required in identical circumstances to provide emergency aide as the only emergency care responders in their villages. In these villages there is no "emergency medical technician." Many (although not all) CHA's have taken EMT courses to enhance their ability to respond in such situations. Nevertheless, we are seeing a rising incidence of litigation and the threat of litigation in recent years. This has led to the same insurance crises for CHA's as for EMTs.

For these reasons, we suggest that this Committee clarify the Good Samaritan law in two ways. First, language should be inserted in Section 90(a) to expressly include Community Health Aides. Second, language should be inserted in the same section to expressly protect persons with a pre-existing duty. Under this proposal, Section 90(a) would be amended as follows, (new language underscored) (before addition of the language proposed in H.B. 340):

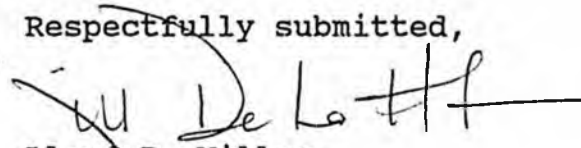
(A) a person at a hospital or any other location, including a community health aide, who renders emergency care or emergency counseling to an injured, ill or emotionally distraught person who reasonably appears to the person rendering the aide to be in immediate need of emergency aide in order to avoid serious harm or death is

Honorable Chairman Sund
February 17, 1988
Page 4

not liable for civil damages as a result of an act or omission in rendering aid, regardless of whether the person is under a pre-existing duty to render assistance.

We would be happy to elaborate at greater length the reasons why this amendment is so important and appropriate, and to furnish you with any additional information which you feel would be helpful.

Respectfully submitted,



Lloyd B. Miller
Jill A. De La Hunt

LBM:JAD/kg
cc: John Hartle
All Committee Members
Sund

11625 Paddock Lane
Anchorage, Alaska 99516
February 16, 1988

Representative John Sund
Chairman, House Judiciary Committee
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Representative Sund,

I just had the opportunity to review the House Bill No. 340 which was amended by the House Labor and Commerce Committee.


This amendment, under Section 1 (c) (2), which further describes just what a "Volunteer" is completely wipes out the National Ski Patrol System (NSPS), which is non-profit volunteer organization who performs emergency services to ski resorts and other functions such as the Anchorage Fur Rendezvous, as being a volunteer under this amendment.

At most ski areas nationwide, where the NSPS performs volunteer emergency services such as the initial first aid assistance to injured skiers, the NSPS volunteer ski patrollers usually receive a free lift ticket (or "chit") for each day they patrol as an incentive to be a patroller. This amounts to a compensation of anywhere from \$10.00 to 36.00, depending upon the cost of the ski area ticket, for a days work of patrolling on their own time.

Most of the patrollers are dedicated to their duties and spend considerable amount of time and effort in training outside of their normal every day job and actual patrolling to keep up their skills in emergency first aid and other required training. I myself has spent over a 1,000 hours each year as both a volunteer instructor and as a trainee for the NSPS. Only a small part of this time was actually involved patrolling on the hill where a minute compensation was provided by the ski resort in the form of a "chit". The rest of the time was not compensated for other than obtaining the satisfaction of being in the position of helping people in need. It is quite common for other patrolers to spend this same amount of time and effort each year also.

Because I strongly feel the need of this legislation to protect dedicated NSPS volunteer patrollers while performing their duty from being liable for civil damages it is requested that every effort be taken by the Judiciary Committee to strick the wording "financial consideration" from Section 1 (c) (2), line 20 and substitute the words "cash payment" instead.

Sincerely yours,


Wallace J. Watts
National Ski Patrol Member

CC: Representative Sam Cotton
Representative Max Gruenberg Jr.
Representative Romona Barnes

FEB 24 1988

Alaska State Legislature
House of Representatives



P.O. BOX 783
GIRDWOOD ALASKA 99587
(907) 783 2905

AKLE NUMBER
POUCH V
JUNEAU ALASKA 99811
(907) 465 2693-2719

REPRESENTATIVE
JIM ZAWACKI
DISTRICT 7

MEMBER
COMMUNITY & REGIONAL
AFFAIRS COMMITTEE
LEGISLATIVE BUDGET &
AUDIT COMMITTEE
FINANCE SUBCOMMITTEE

2/22/88

Dear John,

I have enclosed a
copy of a letter with a
legitimate concern pertaining
to volunteers and their liability.

If his concern is
warranted, is there anyway we
can amend to eliminate problems.

Your assistance is
appreciated.

Thanks John

Jim

C.C. DON DAVIS

February 15, 1988

Representative Jim Zawacki
Pouch V
Juneau, Alaska 99811

in re: HB 340

Dear Jim:

Thank-you for your letter dated February 3, 1988.

I note that you have sent a copy to Judy Kuleta. The only reason I can think of why you would have sent her a copy is because I am a member of the fire department in Girdwood. However, HB 340 has nothing to do with our Department in Girdwood. The members of the Girdwood Fire Department are not volunteers in the true sense of the word, they are paid on call firefighters. That is when there is a fire call each member of the Department who responds is paid \$10.00 per hour.

My interest comes from the area of the National Ski Patrol which provides mountain rescue services. The patrol of which I am a member is the Sourdough Ski Patrol which patrols at Mount Alyeska.

As you are aware the Ski Patrol does not charge for their services, i.e. it is a volunteer organization.

The ammendment of the Labor and Commerce Committee which defines or attempts to define volunteer completely changes the thrust of HB 340 as far as it relates to the Sourdough Ski Patrol.

The reason is simple. Mount Alyeska resort gives each patrol person a ski chit for each day patrolled. Said chits are redeemable for a ski ticket. Currently the cost of a ticket is \$22.00 which exceeds the \$10.00 per day limitation written in by the Labor and Commerce Committee. This in effect removes our ski patrol from coverage under the bill.

I much prefer the original wording of the bill. If something has to be said about compensation why not something along the order of "A volunteer organization is one which does not solicit funds for the service which it provides. The member provided the service while acting as a member of the organization." Not great wording but I am sure that you get my meaning.

There are many volunteer organizations which do not charge for their services, but what if the person(s) assisted give money to the individual providing the service, said individual accepting money as a donation to the organization while the donator may feel that he is giving compensation to the individual providing the service?

I do not want to beat it to death. All I ask is that you do what you can.

Thank-you,



Donald L. Davis
P.O. Box 674
Girdwood, Alaska 99587

Alaska State Legislature

House of Representatives



P.O. BOX 783
GIRDWOOD, ALASKA 99587
(907) 783-2905

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-2693/2719

REPRESENTATIVE
JIM ZAWACKI
DISTRICT 7

February 3, 1988

MEMBER
COMMUNITY & REGIONAL
AFFAIRS COMMITTEE
LEGISLATIVE BUDGET &
AUDIT COMMITTEE
FINANCE SUBCOMMITTEE

Donald Davis
P.O. Box 674
Girdwood, AK 99587

Dear Don:

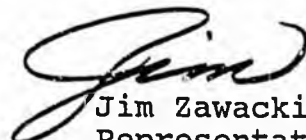
Thank you for your public opinion message regarding HB 340 and SB 346, granting immunity from civil liability for providing volunteer emergency services.

I am also in favor of these bills. Representative Mike Davis of Fairbanks is the prime sponsor and I have signed on the bill as a co-sponsor. HB 340 has moved from the House Labor & Commerce Committee to the House Judiciary Committee. House Labor & Commerce did make some changes to the bill so I have taken the liberty of enclosing a copy of the committee substitute for your review. HB 340 is scheduled on the House Judiciary Committee calendar for February 12th, Friday, at 1:30 p.m.. You and others in the community might want to send a p.o.m. of support to Representative John Sund who is the chairman of House Judiciary Committee. As for SB 346 it is in Senate Judiciary Committee and as of yet no hearing has been scheduled.

Don, for those people who are giving of themselves in saving lives and risking their own, we need to make sure they are protected from all liability.

I appreciate your input. If I can be of further assistance, please don't hesitate to contact me.

Sincerely,


Jim Zawacki
Representative

Enclosure
cc: Judy Coletta
Fire Chief, Girdwood
(20)

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE ZAWACKI

NAME: BERNICE LESKSKY

TITLE:

ADDRESS: 3211 SHAMROCK STREET

ZIP: 99504

CITY: ANCHORAGE

PHONE: 337-6333

BILL NO:

SUBJECT: GAME BOARD APPOINTMENT

MESSAGE: REQUEST YOU ASK THE GOVERNOR NOT TO REAPPOINT GAME BOARD MEMBER,
AN BALLEMBERGHE, WHO IS SUPPORTED BY GREENPEACE DEFENDERS OF WILDLIFE.
PORTSMAN STRONGLY OPPOSE HIM.

POMID: 03091558

DATE: 01/29/88

TIME: 09:15:58

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

ADAMS
BOUCHER
BROWN
COLLINS
DAVIDSON
DONLEY
FRANK
GOLL
GRUSSENDORF
HERRMANN
HUDSON
LARSON
MENARD
NAVARRE
PETTYJOHN
POURCHOT
SHULTZ
SUND
TAYLOR
WALLIS

BARNES
BOYER
CATO
COTTEN
DAVIS
ELLIS
FURNACE
GRUENBERG
HANLEY
HOFFMAN
KOPONEN
MARTIN
MILLER
PEARCE
PHILLIPS
RIEGER
SPRINGER
SWACKHAMMER
ULMER

ABOOD
BINKLEY
COGHILL
DUNCAN
ELIASON
FAHRENKAMP
FAIKS
FANNING
FISCHER
HALFORD
HENSLEY
JONES
JOSEPHSON
KELLY
KERTTULA
RODEY
STURGULENSKI
SZYMANSKI
UEHLING
ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE ZAWACKI

NAME: DONALD DAVIS

TITLE:

ADDRESS: P.O. DOX 674

ZIP: 99587

CITY: GIRDWOOD

PHONE: 783-2952

BILL NO:

SUBJECT: HB340/SB346, GOOD SAM ACT
MESSAGE: I'M IN FAVOR OF THESE BILLS.

POMID: 03094557

DATE: 01/29/88

TIME: 09:45:57

LIONAME: ANCHORAGE LIO

COPIES: SENATOR

SZYMANSKI

add Bills



NATIONAL SKI PATROL SYSTEM, INC.

P.O. Box 432
Douglas, Alaska 99824
March 4, 1988

Affiliations
NATIONAL SKI ASSOCIATION
NATIONAL SAFETY COUNCIL
ADVISORY COMMITTEE (U.S.
ARMY) ON MOUNTAIN AND
ARCTIC WARFARE

ALASKAN DIVISION

Honorable Mike Davis
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99801

Dear Representative Davis:

This letter pertains to CSHB 340 (Labor & Commerce) regarding providing immunity from civil liability for certain kinds of volunteer work.

I understand the bill is scheduled for a House Judiciary Committee hearing next Monday. I plan to attend the hearing.

In the meantime, after consulting with a number of NSPS patrollers in Alaska, I have the following comments to offer. These are in particular related to Ed Hein's points explained to you in his memorandum of February 19:

1. Preexisting duty to rescue. This intent is what started the concern for necessary legislation, and we agree with Mr. Hein's explanation and rationale.
2. Definitions of volunteers and compensation. We are still concerned about this one. We need to be certain that the bill clearly states that only cash payments are included in the dollar amount limitations. Mr. Hein's suggestion for changing line 20, by striking the words "receives financial consideration of", and replacing them with "is paid" may solve our problem regarding the value of complimentary ski tickets which are given to patrollers in recognition for their service.

However, an even more direct and clear phrase has been proposed by one of our patrollers, Mr. Wallace Watts, from Anchorage. In a letter dated February 16, to Representative John Sund, Chairman, House Judiciary Committee, Mr. Watts suggests striking the words "financial consideration" and replacing them with the words "cash payments". We like this suggestion better, compared to "is paid".

3. Liability of organizations. We prefer to see the word-age left as is, and the organization also protected with immunity, except for proven negligence. Otherwise, it's conceivable that the officers of the organization, themselves, might be held liable. If that were to happen, it could seriously impede future recruitment efforts for emergency service volunteers; it could even jeopardize the basic mission of the charitable organization, which is one in the public interest. Negligence seems to be the key, here. If a member is proven negligent in his or her

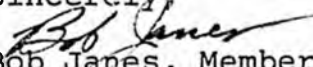
performance, then the recourse is already there - that of bringing a lawsuit against either or both the individual and the organization. There really seems to be no need to make a change in the wordage as stated in the bill right now.

4. Advanced life support. We understand the reason for this proposed amendment, and we have no objection to Mr. Hein's suggested wordage.

Finally, this legislation is extremely important to our organization, and we urge its passage out of the House Judiciary Committee next Monday.

We definitely need to have an appropriate law enacted during this Session of the Legislature. In that respect, we would encourage that companion bills on the Senate side, SB No. 346 (Fahrenkamp, et al), and SB No. 448 (Duncan) be reconciled in language consistent with HB 340.

Sincerely,


Bob Janes, Member
Juneau Ski Patrol, NSPS

cc: ✓ Representative John Sund, Chairman House Judiciary Committee
Representative Bill Hudson
Representative Fran Ulmer
Senator Jim Duncan

Committee



Alaska State Legislature

Representative Mike Davis

P.O. Box V
Juneau, Alaska 99811
(907) 465-4930/4941

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708

TO: House Judiciary Committee
FROM: Rep. Mike Davis
DATE: February 11, 1988
RE: CSHB 340, granting immunity from civil liability for providing volunteer emergency services.

CSHB 340 amends the Good Samaritan Act to protect members of volunteer first aid organizations from liability.

Ordinary citizens who try to help in emergency situations are protected from liability by the Good Samaritan Act, AS 09.65.090. Paramedics and EMTs who are certified by the state are covered in liability questions by AS 18.08.086. However, members of volunteer rescue organizations such as the National Ski Patrol, Civil Air Patrol, and mountain rescue groups may not have any statutory protection.

First aid and rescue volunteers are vulnerable to litigation because they have an obligation to help people while serving in their organizations. The Alaska Supreme Court has ruled that the Good Samaritan Act does not protect those who have a "pre-existing obligation to assist individuals in danger".

CSHB 340 would protect emergency services volunteers and their organizations from liability for their good faith attempts to aid those in danger. However, they would still be liable for damages as a result of "gross negligence, recklessness, or intentional misconduct" as stated in subsection (b) of the existing Good Samaritan Act.

BILL NO:

HB 340

DATE:

1/20/88

TITLE:

An Act Granting Immunity
From Civil Liability For
Providing Volunteer
Emergency Services.

CONTACT:

Capt. McConnaughey

DEPARTMENT OF
PUBLIC SAFETY

Search and rescue in Alaska is the responsibility of the Alaska State Troopers, U.S. Air Force, and U.S. Coast Guard. All three agencies use volunteers to aid in the search activities. Probably 70% of all Trooper searches are conducted by volunteers acting under the direction of the Troopers. The organized volunteers are trained, equipped, and ready on a moment's notice. All search and rescue agencies depend on the volunteers. Without volunteers our job would be more difficult and time consuming. This bill provides the volunteers with a degree of civil protection if someone is inadvertently injured during the rescue.

Arthur English / jc
Arthur English, Commissioner

POSTMASTER / RETURN TO: ALASKA DEPARTMENT OF PUBLIC SAFETY, JUNEAU, ALASKA 99801

Position Paper

CSHB 340 (L&C)

For an Act entitled: "An Act granting immunity from civil liability for providing volunteer emergency services."

This Act amends AS 09.65.090 (civil liability for emergency aid) to expand the coverage to a person who provides emergency services (e.g., first aid and search and rescue), while acting as a volunteer for an organization that exists for the purpose of providing the service rendered, regardless of whether the organization or members are under a preexisting duty to render assistance. Currently, AS 09.65.090 only provides immunity from liability to persons who do not have a preexisting duty to act. Many individuals and organizations providing emergency services, such as volunteer ski patrollers and search and rescue teams, do not currently have protections from liability afforded by statute.

The department assumes that the term "other emergency services," on line 13, does not include advanced life support services such as defibrillation, drug therapy, intravenous therapy, and advanced airway treatment, as these emergency services should be provided only by trained and licensed professionals.

Position

The department supports the intent of this legislation because it increases immunity from liability for volunteer emergency service workers, many of whom are under a preexisting duty to act and, consequently, are not covered by AS 09.65.090. It is likely that passage of this legislation would increase the number of individuals willing to provide emergency services and would decrease the rate of attrition among emergency service volunteers.

However, the department recommends that the term "other emergency services" be defined to exclude advanced life support procedures as defined in AS 18.08.090.

POSITION PAPER/Department of Health & Social Services

Position Paper, CSHB 340 (L&C), pg. 2

Recommended by:

Elizabeth A. Ward
Elizabeth Ward, M.N.
Director
Division of Public Health

Date:

February 2, 1988

Approved by:

Myra M. Munson
Myra M. Munson
Commissioner
Department of Health and
Social Services

Date:

February 9, 1988

LAW OFFICES
SONOSKY, CHAMBERS, SACHSE & MILLER

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DOUGLAS B. L. ENDRESON**
MARY V. BARNEY
ANNE D. NOTO
JILL A. DE LA HUNT*

OF COUNSEL
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ROGER W. DUBROCK

WASHINGTON, D. C. OFFICE
1250 EYE STREET, N. W.
WASHINGTON, D. C. 20005
(202) 682-0240

February 12, 1988

*ALASKA AND DISTRICT OF COLUMBIA BARS
**WISCONSIN BAR
ALL OTHERS DISTRICT OF COLUMBIA BAR

Honorable Chairman Sund
House Committee on Judiciary
State Capitol Bldg.
P. O. Box V (Mail Stop 3100)
Juneau, AK 99811

Re: Good Samaritan Law Amendments
(Our File No. 911.21)

Dear Chairman Sund:

We write on behalf of the Alaska Native Health Board and the Association of Regional Health Directors to comment on H.B. 340, a bill granting immunity from civil liability for individuals providing volunteer emergency services. This bill would amend AS 09.65.090 by adding a new subsection to Alaska's existing "Good Samaritan" statute.

The Good Samaritan statute promotes an important public policy by encouraging citizens (whether trained professionals or lay persons) to provide medical assistance to people suffering a medical emergency. The statute is particularly important given the ever-increasing tendency to turn to the courts to resolve all problems. While we believe that the protection of volunteers (addressed in the bill) is laudable, we also think the Committee should take this opportunity to address two additional serious health care issues in this area: (1) the liability of "Community Health Aides" providing emergency medical services, and (2) the liability of all persons who have a pre-existing duty to provide emergency services. We discuss these issues below.

Community Health Aides are the backbone of the health care delivery system throughout rural Alaska. In most villages, they are the only health care provider available in emergencies. As a consequence, Community Health Aides across the State feel a special obligation to assist those in need, especially those in

Honorable Chairman Sund
February 12, 1988
Page 2

need of emergency services, and to do so with whatever training and limited resources they may have.

Community Health Aides have a growing fear that as personal injury tort litigation reaches further into rural Alaska, they will soon be faced with lawsuits. Indeed, this trend has already begun. The Health Aides are particularly concerned about their potential exposure when they administer emergency medical care under circumstances where decisions and actions must be taken immediately, guidance from a physician is unavailable, and a person's life is at stake.

Title 11 currently sets forth general protection for individuals who provide emergency care without first receiving the patient's consent (as where the person is unconscious or otherwise unable to give consent) (AS 11.81.430(a)(5)(B)). The more important statute, however is the section now under scrutiny by this Committee, AS 09.65.090 (emphasis added):

(A) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill or emotionally distraught person who reasonable appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering aid.

(B) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct.

On its face, Section 90 would appear to include Community Health Aides within its scope. Clearly a Community Health Aide would be a "person at a hospital or any other location who renders emergency care" In 1971, however, the Alaska Supreme Court construed an earlier version of Section 90 to exclude from coverage any person with a "pre-existing duty" to render aid. Lee v. State, 490 P.2d 1206 (Alaska 1971), overruled in part on other grounds, 545 P.2d 165 (Alaska 1976). A Community Health Aide acting in his or her capacity as a Health Aide would apparently have a pre-existing duty, and under Lee would not be shielded from suit.

The earlier statute construed by the Court in Lee covered "[a] person who, without expecting compensation, renders care to an injured or sick person" AS 09.65.090 (1968). Amendment of the law in 1976 to broaden the scope of coverage to "[a] person at a hospital or other location..." reflected the Legislature's intent to include persons with a pre-existing duty

Honorable Chairman Sund
February 12, 1988
Page 3

(such as nurses and doctors in a hospital emergency). The legislative history to the 1976 amendment confirms this point. Despite the Legislature's effort, the courts continue to exclude "pre-existing duty" persons from Alaska's Good Samaritan statute, as demonstrated in a very recent decision from the federal district court in Alaska. See Bunting v. United States, 662 F.Supp. 971, 973 (D.Alaska 1987). For this reason, it is clear that Section 90 requires further amendment.

We note that, Alaska has adopted a separate "good samaritan" statute to specifically protect emergency medical technicians (See AS 18.08.086(a)). This statute was amended in 1986 to broaden its scope to cover emergencies posing risks of serious harm (in addition to risks of death). As we understand it, much of the genesis for this statute and its 1986 amendment was concern over increasing tort litigation arising out of emergency situations where snap decisions must be made in order to save a person's life. The increased risk of litigation has in turn driven up insurance rates astronomically in recent years for emergency medical technicians, an additional strong incentive for this law and its 1986 amendment.

The situation with Community Health Aides is even more compelling than with emergency medical technicians and, we believe, justifies identical treatment by the Alaska Legislature. Specifically, Community Health Aides are required in identical circumstances to provide emergency aide as the only emergency care responders in their villages. In these villages there is no "emergency medical technician." Many (although not all) CHA's have taken EMT courses to enhance their ability to respond in such situations. Nevertheless, we are seeing a rising incidence of litigation and the threat of litigation in recent years. This has led to the same insurance crises for CHA's as for EMTs.

For these reasons, we suggest that this Committee clarify the Good Samaritan law in two ways. First, language should be inserted in Section 90(a) to expressly include Community Health Aides. Second, language should be inserted in the same section to expressly protect persons with a pre-existing duty. Under this proposal, Section 90(a) would be amended as follows, (new language underscored) (before addition of the language proposed in H.B. 340):

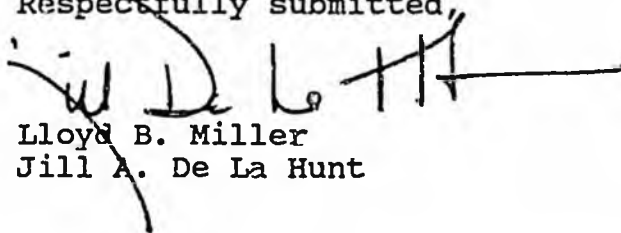
(A) a person at a hospital or any other location, including a community health aide, who renders emergency care or emergency counseling to an injured, ill or emotionally distraught person who reasonably appears to the person rendering the aide to be in immediate need of emergency aide in order to avoid serious harm or death is

Honorable Chairman Sund
February 12, 1988
Page 4

not liable for civil damages as a result of an act or omission in rendering aid, regardless of whether the person is under a pre-existing duty to render assistance.

We would be happy to elaborate at greater length the reasons why this amendment is so important and appropriate, and to furnish you with any additional information which you feel would be helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Lloyd B. Miller" and "Jill A. De La Hunt" written together. The signature is stylized and includes a long horizontal line extending to the right.

Lloyd B. Miller
Jill A. De La Hunt

LBM:JAD/kg

cc: John Hartle



National Ski Patrol System, Inc., Alaska Division

Marc D. Bond
 Winter Emergency Care Supervisor
 1007 West Third Avenue # 400
 Anchorage, Alaska 99501

W: (907) 279-3581
 H: (907) 345-6078

January 18, 1988

Representative Dave Donley
 Chairman, House Labor and Commerce Committee
 Mail Stop 3100
 P.O. Box V
 Juneau AK 99811

Re: House Bill 340: "An Act granting immunity from civil liability for providing volunteer emergency services."

Dear Chairman Donley:

I am a volunteer ski patroller at Alyeska Resort. Virtually all ski patrollers in Alaska are members of the National Ski Patrol System, Inc., a national volunteer organization which trains and provides ski patrollers who volunteer millions of hours each year to promote ski safety and to rescue lost and injured nordic and alpine skiers.

We rigorously train our patrollers in first aid, skiing and rescue techniques. Many people in Alaska owe their lives or physical health to the swift and careful care given them by Alaska ski patrollers.

Now we are finding that our patrollers are reluctant to become involved in rescue situations. Several have quit volunteering their time to patrol activities. These patrollers would like to help, but over the course of the last several years they have become afraid of being sued because of their participation in assisting lost and injured skiers.

Unfortunately we can do little to calm their fears. It is true that ski patrollers are infrequently sued. It is also true that these suits seldom result in judgments against the patrollers. Nevertheless, statistics mean little when you find yourself on the receiving end of a summons and complaint. I enclose a story from the Riverside (California) Mountain Rescue Unit newsletter telling about a \$12 million suit initiated against the organization and several of its members by an individual they had rescued.

It seems grossly unfair that one should volunteer time, money and effort to help others, and then be sued by the very ones helped.

★ Promoting Ski Safety In America's Last Frontier ★

Representative Dave Donley
January 18, 1988
Page 2

As the late William Prosser stated, "The result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." W. Prosser, *The Law of Torts* § 56, at 344 (4th ed. 1971).

Our Supreme Court has held that the existing Good Samaritan Act does not apply to individuals who have a pre-existing duty to go to the aid of others. (*Lee v. State*, 490 P.2d 1206 (Alaska 1971)). When we put on our patrol parkas and post ourselves on ski hills and trails throughout the state, we wonder if the court would hold that ski patrollers, although volunteers, have that "pre-existing duty" to rescue injured skiers. If so, we lose the protection of the Good Samaritan Act, and can be sued for real or imagined injuries received during the rescue. We do not believe that represents good public policy, for it discourages volunteers from helping others -- the opposite intent of the Good Samaritan Act.

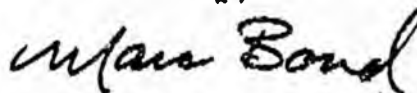
Recently Rep. Mike Davis introduced House Bill 340. I enclose a copy for your information. The Legislative Affairs Agency tells me that it has been initially referred to the Labor and Commerce Committee. Senator Fahrenkamp has introduced identical legislation in the Senate. Senate Bill 346.

House Bill 340 would remove the specter of ruinous litigation for volunteer members of rescue squads. I firmly believe it can be empirically demonstrated that enactment of this legislation would encourage many Alaskans to participate in volunteer rescue squads.

It should be noted that the bill does not attempt to eliminate liability for gross negligence or intentional acts. Such acts would provide a basis for litigation as noted in subsection (b) of AS 09.65.090. Thus, rescued individuals who are the victims of particularly abhorrent care would still be provided a forum to redress the matter.

I urge you to hold prompt hearings on House Bill 340. It is good public policy and ought to be enacted. If I can provide additional information, please let me know.

Sincerely,



Marc Bond

Enc.

cc: Harley Adamson
Tom Smith
Bob Janes

Walter
FYI

no other info

Wagner

Riverside Mountain Rescue Unit Sued for Rescue
In October, 1983, the Riverside Mountain Rescue Unit, Riverside, California was called to help in the rescue of a stranded man on the side of Box Springs Mountain above Riverside. The terrain was too difficult for the general laity to maneuver safely. Craig Fredborg, 23, was hiking with 2 friends when he slipped from a viewpoint and fell 70 feet. After Craig's friends found him, they moved him a short distance and then just waited. Thirty hours elapsed before the RMRU was called and arrived on the scene. Using the proper equipment and the proper methods, the rescue was carried out as quickly as safety for the injured and rescuers would allow.

A year later, the RMRU, along with several other organizations and individuals, finds itself on the receiving end of a twelve million dollar lawsuit filed by the young man who was rescued. Two of the individuals being sued are Walt Walker, President of RMRU (who was not even on the rescue mission) and his son, Kevin, who was a member of the rescue mission.

The Riverside Mountain Rescue Unit is one of the most active and highly respected rescue units in the country. Walt Walker, who has been with the rescue unit for 24 years, has an estimated 10,000 hours of volunteer time with the unit. He says, "To be sued by someone we voluntarily risked our own safety for is difficult, to say the least, to deal with. We wish to continue—we shall have to wait to see if we can."

Interestingly, since the lawsuit was filed, the RMRU has responded to ten calls within a few weeks, and eight people are alive because they came.

-RMRU Newsletter

SEADOGS

South East Alaska Dogs Organized for Ground Search

by Gloria Houston Way

Juneau — It was the day after Thanksgiving, cold, damp and gloomy, when all sane persons were settled in front of their cozy fires doing nothing more energetic than digesting leftovers. By late afternoon at the end of Basin Road, the steep mountains looming over Silver Bow Basin cut off what little direct light was left.

But there I was, shivering and stomping around, waiting for the SEADOGS to arrive, and wondering why I had given up my holiday afternoon to watch them work out. I think it was mostly curiosity to see if they would show up on such a day. But they did, dogs and handlers, just as they do week in and week out, year in and year out to prepare for every kind of weather situation, every kind of emergency and every kind of terrain they might encounter in a search.

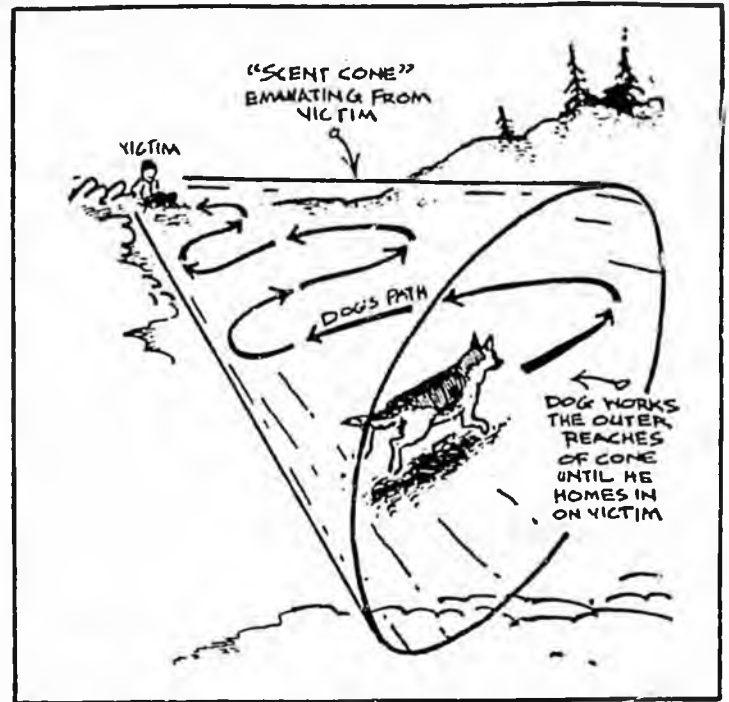
As a result of this constant training, Juneau's SEADOGS can search the wilderness for lost hunters, lost children, disoriented hikers. They can search in the dark, find an avalanche victim buried under thirty feet of snow, or locate victims under the rubble of a collapsed building. The SEADOGS also know how to ride chairlifts, snowcats, and helicopters, and run with skiers to an avalanche site — anything to get where they need to be.

On this November day, the steep wooded hillsides covered with underbrush, dead leaves, and old gold mining debris provided a challenging environment for the task at hand.

Today the practice would focus on grid searches for planted 'victims' hidden in the woods. The group is always recruiting volunteer victims for these practices -- people whose scent is unfamiliar to the dogs. My husband and daughter got roped into it this time. The dogs usually rely on air scenting more than on tracking ground scents. Juneau's climate and terrain — rain washed slopes, slick ledges and numerous bodies of water — make ground tracking useless after about half a day.

An air scent travels in a cone shape out from the victim. The dogs are trained to work from side to side of a theoretical cone until they hone in on a victim. If there is no wind there is little scent; but if there is any wind at all, a dog can pick up a scent a quarter of a mile away. Generally, the dogs will go across and into the wind to pick up a scent.

In avalanche situations, the scent will travel through the snow and 'pool' on the surface of the snow. The previous winter I had watched a demonstration of SEADOGS training for avalanche work. Beginner dogs were practicing finding victims buried in the snow — not too far away and not too deep. It was obvious the dogs loved this game, and especially the rewards and affection heaped on them when they finally led the searchers right to the victim. As their assignments get more challenging, Search and Rescue dogs eventually



become the most efficient method known for finding avalanche victims, once they are on the scene.

On this afternoon, the group quietly got organized, hiding victims and assigning one or more teams to search in different sectors for each victim. A dog can cover a lot of territory back and forth across a sector, saving his handler fruitless effort. When the dog finds the victim, he 'alerts,' then goes back to his handler, then back to the victim, then back and forth between the two until the handler finds the victim. Only then is the dog rewarded.

While the searches were going on, Bruce Bowler, unofficial spokesman for the group, told me a little more about SEADOGS and what it takes to be a successful SAR dog team.

SEADOGS, South East Alaska Dogs Organized for Ground Search, was first organized about ~~over~~ years ago

SEADOGS has been going ever since, although as in most volunteer groups there's been turnover and burn-out. The constant training and practice, as well as the 'on-call' nature of the commitment, insure that only the most dedicated endure.

Currently in Juneau there are four search teams (handler and dog) qualified to be on the Call Out List and five or six teams in the Support Group — still in training. It was obvious to me as I watched these teams work out that each handler loves dogs and each dog loves people. That seems to be the main prerequisite for a successful team.

Dogs are selected for their good disposition and general obedience, as well as their trainability, size, breed and sensitivity. Bruce thinks any medium to large working breed with high endurance can be suitable, providing he has the proper bonding, motivation and training. He also needs a double coat: for warmth, and for protection from Devil's Club — that bane of all

SEADOGS

SOUTHEAST ALASKA DOGS
ORGANIZED FOR GROUND SEARCH

PO BOX 244

JUNEAU, ALASKA 99802

1/15/88

REPRESENTATIVE MIKE DAVIS
ALASKA STATE LEGISLATURE
PO BOX V
JUNEAU, AK. 99811

REPRESENTATIVE DAVIS:

I AM WRITING YOU IN SUPPORT OF HOUSE BILL 340, "AN ACT GRANTING IMMUNITY FOR VOLUNTEER EMERGENCY SERVICES". "SEADOGS" IS A STATEWIDE SEARCH AND RESCUE DOG ORGANIZATION WHICH PROVIDES TRAINED SEARCH DOGS AND HANDLERS TO THE STATE TROOPERS, COAST GUARD, AND AIRFORCE RESCUE CENTERS, AS WELL AS LOCAL LAW ENFORCEMENT AGENCIES ON A VOLUNTEER BASIS. OUR HANDLERS DEVOTE MANY HOURS OF THEIR PERSONAL TIME EVERY WEEK TRAINING FOR SEARCHES, AND THE TIME THEY SPEND IN THE FIELD SEARCHING FOR SOMEONE'S CHILD, A LOST HIKER OR HUNTER, OR SOMEONE TRAPPED IN AN AVALANCHE OR EARTHQUAKE RUBBLE IS PAID FOR OUT OF OUR OWN POCKETS. THIS BILL WOULD ALLOW TEAM MEMBERS TO OPERATE CONFIDENT IN THE KNOWLEDGE THAT ANY FIRST AID ADMINISTERED BY THEM, OR ANY ATTEMPTS TO ASSIST A LOST OR INJURED INDIVIDUAL WITHIN THE SCOPE OF OUR TRAINING, WOULD NOT BE MET BY CIVIL LIABILITY.

WE WHOLEHEARTEDLY SUPPORT THE BILL, AND REQUEST THAT YOU GIVE IT YOUR BEST EFFORTS.

SINCERELY,



L. BRUCE BOWLER
PRESIDENT
SEADOGS



NATIONAL SKI PATROL SYSTEM, INC.
ALASKA DIVISION

_____ DIVISION

_____ TITLE

101 College Road
Fairbanks, Alaska
January 18, 1988

Representative Mike Davis
Fairbanks Legislative Delegation
Fairbanks, Alaska

Dear Representative Davis:

Re: House Bill # 340

Thank you for your interest in amending the "Good Samaritan" act in the State of Alaska.

The Ski Patrol is a volunteer organization dedicated to public service by promoting safe skiing and providing rescue services. All members are trained in emergency first aid care to the level of American Red Cross Advanced First Aid, or beyond. This bill will directly and immediately affect our position as volunteers.

As the Director of the Ski Patrol in Alaska, representing three hundred and fifty members, I strongly urge your support of Senate Bill #346 ,and request immediate action on said bill.

Thank you.

Sincerely,

Harley Adamson
DIVISION DIRECTOR
ALASKA DIVISION
NATIONAL SKI PATROL SYSTEM

Put with
File

PUBLIC OPINION MESSAGE

JAN 26 1988

DEAR: REPRESENTATIVE DAVIS

NAME: PHIL HOCKER
TITLE: CIVIL AIR PATROL
ADDRESS: 9631 STIKINE
CITY: JUNEAU
PHONE: 789-9507
BILL NO: HB 340
SUBJECT: IMMUNITY FOR VOLUNTEER RESCUE GROUPS
MESSAGE: PLEASE SUPPORT THESE BILLS. THEY WOULD AID THE OPERATIONS OF THE CIVIL PATROL IN PROVIDING EMERGENCY SERVICES IN RESCUE SITUATIONS. SB 346 AND HB 340.

ZIP: 99801

POMID: 00165139
DATE: 01/25/88
TIME: 16:51:39
LIONAME: JUNEAU LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

ADAMS	BARNES	ABOOD
BOUCHER	BOYER	BINKLEY
BROWN	CATO	COGHILL
COLLINS	COTTEN	DUNCAN
DAVIDSON	DONLEY	ELIASON
ELLIS	FRANK	FAHRENKAMP
FURNACE	GOLL	FAIKS
GRUENBERG	GRUSSENDORF	FANNING
HANLEY	HERRMANN	FISCHER
HOFFMAN	HUDSON	HALFORD
KOPONEN	LARSON	HENSLEY
MARTIN	MENARD	JONES
MILLER	NAVARRE	JOSEPHSON
PEARCE	PETTYJOHN	KELLY
PHILLIPS	POURCHOT	KERTTULA
RIEGER	SHULTZ	RODEY
SPRINGER	SUND	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

file
with
Bill

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE DAVIS

NAME: JOHN M. KINNEY
TITLE: CIVIL AIR PATROL
ADDRESS: 1751 EVERGREEN AVE
CITY: JUNEAU
PHONE: 586-1857
BILL NO: HB 340
SUBJECT: IMMUNITY FOR VOLUNTEER RESCUE GROUPS
MESSAGE: I SUPPORT THESE BILLS AND URGE THEIR PASSAGE: HB 340 AND SB 346.

ZIP: 99801

POMID: 00110008
DATE: 01/28/88
TIME: 11:00:08
LIONAME: JUNEAU LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

ADAMS	BARNES	ABOOD
BOUCHER	BOYER	BINKLEY
BROWN	CATO	COGHILL
COLLINS	COTTEN	DUNCAN
DAVIDSON	DONLEY	ELIASON
ELLIS	FRANK	FAHRENKAMP
FURNACE	GOLL	FAIKS
GRUENBERG	GRUSSENDORF	FANNING
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KOPONEN	LARSON	HENSLEY
MARTIN	MENARD	JONES
MILLER	NAVARRE	JOSEPHSON
PEARCE	PETTYJOHN	KELLY
PHILLIPS	POURCHOT	KERTTULA
RIEGER	SHULTZ	RODEY
SPRINGER	SUND	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 19, 1988

SUBJECT: Immunity for volunteers - CSHB 340(L&C)
TO: Representative Mike Davis
FROM: Edward H. Hein *EHA*
Legislative Counsel

You asked that I comment on the issues raised at the House Judiciary Committee meeting on CSHB 340 (L&C). The issues mentioned and my comments follow.

1. Preexisting duty to rescue. This bill does not remove or impose a preexisting duty on anyone. Nor does the bill clarify who has a preexisting duty. The bill says that whether or not you have a preexisting duty to render assistance in an emergency, if you render aid while acting as a volunteer member of an emergency services organization you will not be held civilly liable for your negligence. The courts have not spelled out who has a preexisting duty and who does not. This bill provides immunity without regard to preexisting duty. The effect is to assure these volunteers that they have immunity just as ordinary citizens do under the good samaritan act, without have to decide whether the volunteers have a preexisting duty. Another way to look at it: the bill overrules the Lee case for emergency services volunteers.

2. Definitions of volunteer and compensation. The word "volunteer" can have different meanings. Ordinarily it refers to a person who does or offers to do something he is not under any obligation or compulsion to do. A volunteer may or may not be compensated in any way for his services. A volunteer may or may not be obligated to perform services or acts after volunteering. An example might be someone who volunteers for military service instead of being drafted. Another example is the Peace Corps or Vista volunteer. Whether the volunteer is to be compensated in any way, and whether the volunteer takes on any legal obligations to do

Representative Mike Davis

Page 2

February 19, 1988

anything, is ordinarily a matter of contract. In the context of this bill, I believe it is necessary to specify by definition who qualifies as a volunteer. Without a definition, it is not clear who is covered by the immunity. The definition in the bill addresses the question, "How much can a person be paid before he is no longer considered a volunteer?" The bill, by its terms, makes it unnecessary to address the question of whether a person must be under no preexisting duty in order to be considered a volunteer. Because questions have been raised about whether the definition of volunteer would allow volunteers to be compensated with ski lift tickets, you may wish to consider an amendment. At page 1, line 20, you could delete "received financial consideration of" and insert "is paid". This, I believe, would make it clear that only money payments are considered.

3. Liability of organizations. The bill provides immunity for organizations that exist for the purpose of providing emergency services, but the immunity applies only to the negligence of the organizations' volunteer members. If you wish to allow injured persons to hold an organization liable for the volunteer's negligence, I would suggest the following amendment: at line 11, delete "An organization and its members are" and insert "A member of an organization that exists for the purpose of providing emergency services is"; at line 14, delete "organization or members are" and insert "member is"; at lines 16 - 18, delete "(1) the organization exists for the purpose of providing the service rendered; and (2)".

4. Advanced life support. It was proposed by Representative Barnes and by the Department of Health and Social Services representative at the meeting that the bill be amended to provide that volunteers would not have immunity if they tried to administer advanced life support procedures without being certified under AS 18.08. If you wish to exempt such services from the immunity provision of AS 09.-65.090(c), I would suggest that you not use the definition of advanced life support in AS 18.08.090. That definition specifies that advanced life support is an emergency care technique provided under the written or oral orders of a physician. It would be clearer if you spelled out the techniques that are excluded from immunity coverage. For example, you might add this amendment: After line 23, insert "(d) The immunity provided under (c) of this section does not apply to civil damages that result from providing

Representative Mike Davis
Page 3
February 19, 1988

or attempting to provide any of the following advanced life support techniques unless the person who provided them was authorized by law to provide them: (1) electric cardiac defibrillation; (2) administration of antiarrhythmic agents; (3) intravenous therapy; (4) intramuscular therapy; or (5) use of endotracheal intubation devices."

Note that under AS 18.08.084(c) and 18.08.088, a person who provides advanced life support services outside a hospital without being authorized by law is guilty of a misdemeanor, punishable by a maximum fine of \$1,000 and 90 days in jail. Also note that the amendment excluding advanced life support procedures from immunity would apply only to emergency services volunteers and only when they are "on duty." A person might be immune from civil liability for negligently administering advanced life support under the existing good samaritan act, AS 09.65.090(a). The immunity under that subsection would not apply if the person were under a pre-existing duty or if administering advanced life support amounted to gross negligence or reckless conduct.

EHH:bb
wkb3/006



Alaska State Legislature

Representative Mike Davis

District 19

P.O. Box V
Juneau, Alaska 99811
(907) 456-4930/4941

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-8161

TO: House Judiciary Committee
FROM: Rep. Mike Davis
DATE: March 7, 1988
RE: HB 340, granting immunity from civil liability for providing volunteer emergency services.

You have back before you House Bill 340. The bill amends the Good Samaritan Act to protect members of volunteer first aid organizations from liability. In effect, this legislation overturns the Alaska Supreme Court decision in Lee v. State of Alaska and Frank Johnson (Alaska 490 P.2d 1206).

The Committee raised several concerns about the legislation. These issues are outlined in Ed Heic's memo, which is in your packet. I believe the CS prepared by the subcommittee addresses the concerns, and I support its passage.

The CS makes the following changes in the bill:

1. removes protection for organizations, while retaining immunity for their volunteers;
2. clarifies that it is emergency aid to injured persons that is protected by the bill;
3. clarifies that cash payments to volunteers are restricted, but not lift tickets or reimbursement for expenses.
4. excludes five advanced life saving techniques from coverage by the legislation.



Alaska State Legislature

Representative Mike Davis

District 19

P.O. Box V
Juneau, Alaska 99811
(907) 456-4930/4941

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-8161

TO: Rep. John Suna *John*
Chairman, House Judiciary Committee

FROM: Rep. Mike Davis *Mike*

DATE: February 26, 1988

RE: HB 340, granting immunity from civil liability for providing volunteer emergency services.

As you know, last week the House Judiciary Committee established a subcommittee to consider HB 340. This bill amends the Good Samaritan Act to protect volunteer first aid organizations and their members from liability. The subcommittee consists of Rep. Cotten, Rep. Taylor, and yourself.

The full committee raised several issues related to the bill. Attached is a memo from Ed Hein, legislative counsel, outlining these issues and offering some options for dealing with them. I have incorporated most of those amendments into the attached draft committee substitute.

If you have questions or concerns about the CS, please feel free to contact me. I would be happy to discuss the legislation with you. I hope HB 340 can be brought back before the full House Judiciary Committee early next week.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM

January 11, 1988

SUBJECT: Immunity from civil liability for volunteer
emergency services (Work Order No. 5-1495)

TO: Representative Mike Davis

FROM: Edward H. Hein *EHA*
Legislative Counsel

You have asked whether volunteer ski patrol members are in fact open to liability for negligence during rescue operations and whether, therefore, your legislation (Work Order No. 5-1495A) is needed.

Your bill amends AS 09.60.090, Alaska's "Good Samaritan" law. This law provides immunity from civil liability for negligent acts or omissions by persons rendering emergency aid to people in immediate danger of serious harm or death. The purpose of the law is to encourage people to voluntarily come to the aid of persons in need of rescue without having to fear potential civil liability for negligence. Lee v. State, 490 P.2d 1206, 1209 (Alaska 1971).

The Alaska Supreme Court in Lee ruled that the immunity under this statute does not extend to persons, such as state troopers, who are under a "pre-existing duty to rescue." It is an open question whether ski patrollers have a pre-existing duty to rescue. The Alaska courts have not decided that question. It can be argued that ski patrollers are under a pre-existing duty to rescue and are, therefore, not immune from civil liability under Alaska's Good Samaritan Act. In order that ski patrollers and other similar rescue group volunteers are assured of immunity, it would be prudent to have the provisions of your bill or similar language in the statutes.

Representative Mike Davis
Page 2
January 11, 1988

If you have further questions or comments about this matter,
feel free to contact me at your convenience.

EHH:gc
WKG1:017

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act granting immunity
from civil liability for...
Sponsor: Davis et al.
Requestor: _____

Agency Affected: Health & Social Services
BRU: State Health Services
Components: EMS Certification and
Licensing

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The enactment of HB 340 would have no direct fiscal impact on the Department of Health and Social Services.

Prepared by: Elizabeth Ward, Director *Elizabeth Ward* Phone: 465-3090
Division: Public Health Date: 1-20-88

Approved by Commissioner: *Mona M. Munson* Date: 1-20-88
Agency: Department of Health & Social Services

Distribution (by preparer):

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

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST
Revision Date: _____
Title: "An Act Granting immunity ... for providing ... emergency services."
Sponsor: Rep. Davis, etc.
Requestor: _____

Bill Version: HB340
Publish Date: _____
Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No increase or decrease in the level of expenditures is anticipated as a result of the passage of this legislation.

Prepared by: Francis C. Allan
Division: Alaska State Troopers
Approved by Commissioner: Arthur E. English
Agency: Public Safety
Distribution: (by preparer):

Phone: 269-5691
Date: 1/20/88
Date: 1/20/88

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

HOUSE COMMITTEE REPORT

Date referred: 1/11/88

FURTHER REFERRALS: Judiciary

DATE: 1/21/88

The Labor & Commerce Committee has considered HB 340

"An Act granting immunity from civil liability for providing volunteer emergency services."

RECOMMENDS:

- replace with CS 4B340 (L+C) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note & same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]

SIGNING OTHER RECOMMENDATIONS:

[Signature]
Chairman's signature

HB

344



STATE OF ALASKA
HOUSE OF REPRESENTATIVES

M E M O R A N D U M

DATE: March 1, 1988
TO: House Judiciary Committee
FROM: Representative Peter Goll *Peter Goll*
SUBJECT: CSHB 344 (HESS)

Attached please find materials related to abuse of the disabled.

Physical and sexual abuse of mentally and physically disabled adults is a problem in Alaska and nationally.

HB 344 establishes mandatory reporting requirements and procedures for investigation of attacks on those adults who are so severely disabled that they are clearly unable to protect themselves.

The Division of Family and Youth Services reports that in 1986, there were 202 actual "reports of harm" to the elderly and 312 "reports of harm" to disabled adults under the age of 65 in Alaska.

That is a total of 514 reported cases in a single year. The reported cases represent only a portion of actual incidents.

Attached are:

1. Letter of support from the "Alaska State Association of Retarded Citizens".
2. Letter of support from the "Association of Retarded Citizens of Anchorage".
3. Letter to Rep. Peter Goll from Mr. David Maltman with original draft bill.
4. Sample case files.
5. An "Analysis of State Law and Proposed Model Legislation" covering this area of concern, published by the School of Social Work, Barry University, Miami Shores, Florida.
6. Samples of statutes similar to the language contained in HB 311, from two other states.
7. News articles.

STATE OF ALASKA THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY LEGISLATIVE REFERENCE LIBRARY

May, 1988

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

Mary Van Nimwegen

H. JUD.	3-11-88	1:30p.m.
H JUD	3-8-88	1:30p.m.
H. JUD	3-1-88	1:30p.m.

Original sponsor: Health, Education and
Social Services Committee

BY THE HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE

1 IN THE HOUSE

2

CS FOR HOUSE BILL NO. 344 (HESS)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the protection of persons with
7 disabilities and to disabled adults who are victims
8 of physical or sexual assault."

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

10 * Section 1. AS 09.65.150(a) is amended to read:

11 (a) The driver of a vehicle approaching a physically disabled
12 pedestrian who is carrying a white or metallic-colored cane, or using
13 special equipment for mobility, or using a service animal, shall take
14 precautions necessary to avoid injury to the pedestrian or the service
15 animal. A driver who fails to take necessary precautions and, as a
16 result, causes injury to the pedestrian or the service animal, or
17 causes property damage, is liable [IN DAMAGES] for the injury or
18 damage caused.

19 * Sec. 2. AS 11.76.130(a) is amended to read:

20 (a) A person commits the crime of interference with the rights
21 of a disabled person if the person intentionally prevents or restricts

22 (1) a physically or mentally disabled person from having
23 full and free pedestrian use of a street, highway, sidewalk, walkway,
24 or other thoroughfare, to the same extent that any other person has a
25 right to pedestrian use; or

26 (2) a physically disabled person from being accompanied or
27 assisted by a certified service animal, without an extra charge for
28 the service animal, in a common carrier, place of public accommoda-
29 tion, or other place to which the general public is invited, except as

1 (15) an employee of a homemaker program or home health aide
2 program;

3 (16) an emergency medical technician or paramedic in the
4 mobile intensive care program.

5 (b) A person who knowingly fails or refuses to make a report
6 required under (a) of this section is guilty of a class B misdemeanor.

7 (c) In this section, "disabled adult" means a person 18 years of
8 age or older who has a physical or mental disability, or physical or
9 mental impairment, as defined in AS 18.80.300.

10 Sec. 47.24.120. IMMUNITY FROM LIABILITY; RETALIATION PROHIBITED.

11 (a) A person who in good faith makes a report under AS 47.24.110,
12 regardless of whether the person is required to do so, is immune from
13 civil or criminal liability that might otherwise be incurred or im-
14 posed for making the report.

15 (b) An employer or supervisor of a person who in good faith
16 makes a report under AS 47.24.110 may not discharge, demote, transfer,
17 reduce pay or benefits or work privileges of, prepare a negative work
18 performance evaluation of, or take other detrimental action against
19 the person because the person made the report. The person making the
20 report may bring a civil action for compensatory and punitive damages
21 against an employer or supervisor who violates this subsection. In
22 the civil action there is a rebuttable presumption that the detri-
23 mental action by the employer or supervisor was retaliatory if it was
24 taken within 90 days after the report was made.

25 * Sec. 4. AS 28.15.031(b)(4) is repealed.

18
-> unable to report
-> 18.80.300 definitions

Original sponsor: Health, Education and
Social Services Committee

BY THE HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE

1 IN THE HOUSE

2

CS FOR HOUSE BILL NO. 344 (HESS)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to the protection of persons with
7 disabilities and to disabled adults who are victims
8 of physical or sexual assault."

9

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

10

* Section 1. AS 09.65.150(a) is amended to read:

11

(a) The driver of a vehicle approaching a physically disabled

12

pedestrian who is carrying a white or metallic-colored cane, or using

13

special equipment for mobility, or using a service animal, shall take

14

precaution necessary to avoid injury to the pedestrian or the service

15

animal. A driver who fails to take necessary precautions and, as a

16

result, causes injury to the pedestrian or the service animal, or

17

causes property damage, is liable [IN DAMAGES] for the injury or

18

damage caused.

19

* Sec. 2. AS 11.76.130(a) is amended to read:

20

(a) A person commits the crime of interference with the rights

21

of a disabled person if the person intentionally prevents or restricts

22

(1) a physically or mentally disabled person from having

23

full and free pedestrian use of a street, highway, sidewalk, walkway,

24

or other thoroughfare, to the same extent that any other person has a

25

right to pedestrian use; or

26

(2) a physically disabled person from being accompanied or

27

assisted by a certified service animal, without an extra charge for

28

the service animal, in a common carrier, place of public accommoda-

29

tion, or other place to which the general public is invited, except as

1 provided in (b) of this section.

2 * Sec. 3. AS 47.24 is amended by adding new sections to read:

3 ARTICLE 2. PROTECTION OF DISABLED ADULTS.

4 Sec. 47.24.110. REPORTS OF PHYSICAL OR SEXUAL ASSAULT. (a) The
5 following persons who, in the performance of their professional
6 duties, have reasonable cause to believe that a disabled adult is a
7 victim of assault under AS 11.41.200 - 11.41.230 or sexual assault
8 under AS 11.41.410 - 11.41.420, and that the disabled adult is unable
9 to report the crime, shall promptly report the crime to the nearest
10 law enforcement agency:

- 11 (1) a physician or other licensed health care provider;
- 12 (2) a mental health professional as defined in AS 47.30.-
13 915;
- 14 (3) a pharmacist;
- 15 (4) an administrator or employee of a nursing home, resi-
16 dential care, or health care facility;
- 17 (5) a caretaker of the disabled adult;
- 18 (6) a guardian or conservator of the disabled adult;
- 19 (7) a police officer as defined in AS 18.65.290;
- 20 (8) a village public safety officer;
- 21 (9) a village health aide;
- 22 (10) a social worker;
- 23 (11) a member of the clergy;
- 24 (12) a staff employee of a program or project serving dis-
25 abled adults;
- 26 (13) a licensed foster care provider;
- 27 (14) a paid employee of a domestic violence and sexual
28 assault program or a crisis intervention and prevention program as
29 defined in AS 18.66.900;

0-18
18-65
> 65



1 (15) an employee of a homemaker program or home health aide
2 program;

3 (16) an emergency medical technician or paramedic in the
4 mobile intensive care program.

5 (b) A person who knowingly fails or refuses to make a report
6 required under (a) of this section is guilty of a class B misdemeanor.

Class B

7 (c) In this section, "disabled adult" means a person 18 years of
8 age or older who has a physical or mental disability, or physical or
9 mental impairment, as defined in AS 18.80.300.

10 Sec. 47.24.120. IMMUNITY FROM LIABILITY; RETALIATION PROHIBITED.

11 (a) A person who in good faith makes a report under AS 47.24.110,
12 regardless of whether the person is required to do so, is immune from
13 civil or criminal liability that might otherwise be incurred or im-
14 posed for making the report.

15 (b) An employer or supervisor of a person who in good faith
16 makes a report under AS 47.24.110 may not discharge, demote, transfer,
17 reduce pay or benefits or work privileges of, prepare a negative work
18 performance evaluation of, or take other detrimental action against
19 the person because the person made the report. The person making the
20 report may bring a civil action for compensatory and punitive damages
21 against an employer or supervisor who violates this subsection. In
22 the civil action there is a rebuttable presumption that the detri-
23 mental action by the employer or supervisor was retaliatory if it was
24 taken within 90 days after the report was made.

25 * Sec. 4. AS 28.15.031(b)(4) is repealed.

47.24 > 65

Sec 47 24.110 REPORTS OF PHYSICAL OR SEXUAL ASSAULT

- (c) In this section, "disabled adult" means a person 18 years of age or older who manifests a degree of impairment by reason of limited mental or physical function as a result of a developmental disability, accident, illness, or other cause.
- (d) In this section, "unable to report" means that the disabled adult is not able to report the assault due to the severity of the person's disability or the conditions of ^{Care} confinement.

The list of those required to report is based on the elder abuse statute 47.24.010. Peter maintains that members of the clergy should be included.

ourt to hear the
of this section
ewhere, before
unicate the na-
ommunication
itive language,
section applies

Alaska Native
(Indian Child
of Native chil-
gs. (§ 1 art III
104 SLA 1971;
am § 132 ch 6
38 SLA 1986)

lude provisions for
part" in the sec-
tituted "may not
t operate to pro-
ence.

. Sup. Ct. Op. No.
422), 690 P.2d 10
Sup. Ct. Op. No.
. 704 P.2d 774

(6) "juvenile detention facility" means separate quarters within a city jail used for the detention of delinquent minors;

(7) "juvenile detention home" or "detention home" is a separate establishment, exclusively devoted to the detention of minors on a short-term basis and not a part of an adult jail;

(8) "minor" is a person under 18 years of age. (§ 1 art I ch 145 SLA 1957; am § 5 ch 110 SLA 1967; am §§ 5, 6 ch 27 SLA 1970; am §§ 27 — 28 ch 63 SLA 1977; am §§ 91, 92 ch 138 SLA 1986)

Revisor's notes. — Paragraph (5) was enacted as (a). Renumbered in 1986. Reorganized in 1985 and 1986 to alphabetize the terms defined.

Effect of amendments. — The 1986 amendment inserted "'care' or" and "47.10.120(a) and 47.10.230(c)" in paragraph (1) and added paragraph (5).

NOTES TO DECISIONS

"Minor" and "delinquent minor." — The general definition of "minor" in paragraph (8) is inapplicable to the detention of a delinquent minor until the minor's nineteenth birthday under AS 47.10.080,

47.10.100, and likewise, it is inapplicable to the responsibility to pay support for a delinquent minor committed under those sections. In re S.C.Y., Sup. Ct. Op. No. 3179 (File No. S-1509), P.2d (1987).

Chapter 17. Child Protection.

Section

- 20. Persons required to report
- 22. Training
- 23. Reports regarding child pornography
- 64. Photographs and x-rays

Section

- 68. Penalty for failure to report
- 69. Protective injunctions
- 70. Definitions

Sec. 47.17.010. Purpose.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their occupational duties, have cause to believe that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

- (1) practitioners of the healing arts;
- (2) school teachers and school administrative staff members of public and private schools;
- (3) social workers;
- (4) peace officers, and officers of the Department of Corrections;
- (5) administrative officers of institutions;
- (6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has cause to believe is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(e) A person listed in (a) of this section, who in the performance of the person's occupational duties has cause to believe that a child has suffered harm as a result of abuse, shall promptly report the harm to the nearest law enforcement agency if the person making the report (1) has cause to believe that the harm was caused by a person who is not responsible for the child's welfare; or (2) is unable to determine (A) who caused the harm to the child; or (B) whether the person who is believed to have caused the harm has responsibility for the child's welfare. If a person making a report under this subsection cannot reasonably contact the nearest law enforcement agency, and immediate action appears necessary for the well-being of the child, the person shall make the report to the nearest office of the department. The department shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest law enforcement agency. In this subsection, "abuse" means the physical injury, sexual abuse, sexual exploitation, or maltreatment of a child by any person under circumstances that indicate that the child's health or welfare is harmed or threatened. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984); am §§ 8 — 10 ch 39 SLA 1985; am § 2 ch 114 SLA 1986)

Effect of amendments. — The 1985 amendment rewrote subsections (a) and (b) and added subsection (d).

The 1986 amendment added subsection (e).

Sec. 28.15.030. Persons not to be licensed. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.031. Persons not to be licensed. (a) The department may not issue a driver's license to a person who is under the age of 16 years, except that the department may issue a permit under AS 28.15.051 or a restricted license under AS 28.15.121.

(b) The department may not issue an original or duplicate driver's license to, nor renew or reinstate the driver's license of, a person

(1) whose license is suspended or revoked, except as otherwise provided in this chapter;

(2) who fails to appear in court for the adjudication of a certain vehicle, driver or traffic offense when the person's appearance is required by statute, regulation or court rule;

(3) who is an habitual user of alcohol or another drug to such a degree that the person is incapable of safely driving a motor vehicle;

(4) who has previously been adjudged to be afflicted with, or suffering from, a mental disability or a disease and who has not, at the time of application for the license, been restored to competency by the methods provided by law;

(5) when the department, based upon medical evidence, has determined that because of the person's physical or mental disability the person is not able to drive a motor vehicle safely;

(6) who is unable to understand official traffic control devices as displayed in this state or who does not have a fair knowledge of traffic laws and regulations, as demonstrated by an examination;

(7) who has knowingly made a false statement in the person's application for a license or has committed fraud in connection with the person's application for, or in obtaining or attempting to obtain, a license, or who has not applied under oath on the form provided for the purpose of obtaining or attempting to obtain a license or permit; or

(8) who is required under AS 28.20 to furnish proof of financial responsibility and who has not done so. (§ 19 ch 178 SLA 1978)

HB 344
Sec. 4
Repeals
(4)

NOTES TO DECISIONS

Stated in Commercial Fisheries Entry 2011 (File No. 4464), 606 P.2d 1255 (1980).
Comm'n v. Apokedak, Sup. Ct. Op. No.

Collateral references. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 108 to 111.

60 C.J.S., Motor Vehicles, §§ 154, 155.

Constitutionality of statute which makes proof of financial responsibility condition of granting, or of nonsuspension

of, automobile registration license. or driver's license, 115 ALR 1376, 35 ALR2d 1011.

Denial, suspension, or cancellation of driver's license because of physical disease or defect, 38 ALR3d 452.

Effect of amendments. — The 1984 amendment repealed paragraph (8), which defined "disposable earnings."

Chapter 24. Protection of the Elderly.

Section	Section
10. Reports of harm	60. Authority of the department
20. Action on reports	70. Regulations
30. Protective services	75. Quarterly report
40. Review and referral	100. Definitions
50. Confidentiality of reports	

Cross references. — For statement of legislative purpose in enacting AS 47.24, see § 1, ch. 36, SLA 1983, in the Temporary and Special Acts.

81 C.J.S., Social Security and Public Welfare, § 1 et seq.

Licensing and regulation of nursing or rest homes, 97 ALR2d 1187.

Collateral references. — 70 Am. Jur. 2d, Social Security and Medicare, § 1 et seq.

Sec. 47.24.010. Reports of harm. (a) The following persons who, in the performance of their professional duties, have reasonable cause to believe that an elderly person has suffered harm shall, not later than 24 hours after first having cause for the belief, report the harm to the Department of Health and Social Services:

- (1) a physician or other licensed health care provider;
- (2) a mental health professional as defined in AS 47.30.915(11);
- (3) a pharmacist;
- (4) an administrator of a nursing home, residential care or health care facility;
- (5) a guardian or conservator;
- (6) a police officer;
- (7) a village public safety officer;
- (8) a village health aide;
- (9) a social worker;
- (10) a member of the clergy;
- (11) a staff employee of a project funded by the Older Alaskans Commission;
- (12) an employee of a homemaker program or home health aide program;
- (13) an emergency medical technician or a paramedic in the mobile intensive care program.

(b) A report of harm made under this section may include the name and address of the person reporting the harm and shall include

- (1) the name and address of the elderly person;

ingly, we hold the entry to have been unlawful. It follows that the motion to suppress should have been granted. Since no harmless error contention is made, the judgment must be reversed.

REVERSED.

BRYNER, C.J., not participating.



Gerald NICHOLSON, Appellant,

v.

STATE of Alaska, Appellee.

No. 6192.

Court of Appeals of Alaska.

Dec. 30, 1982.

Defendant was convicted before the Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., of sexual assault in the second degree, and he appealed. The Court of Appeals, Singleton, J., held that: (1) although grand jury was improperly impaneled, defendant's failure to show prejudice rendered error harmless; (2) evidence was sufficient to take issue of attempted first-degree sexual assault to both grand jury and petit jury; (3) evidence was sufficient to sustain conviction of second-degree sexual assault; and (4) sentence of seven years imprisonment with six years suspended was not excessive.

Affirmed.

1. Grand Jury ⇐26

Where order purporting to permit grand jury in judicial district other than one in which crime occurred to hear evidence of crime at apparent option of district attorney did not address defendant's case specifically, it could not authorize such grand jury to hear defendant's case. Rules Crim.Proc., Rule 6.

2. Indictment and Information ⇐144.1(2)

Showing that a cognizable group of citizens existed and that such group was underrepresented on grand jury which returned indictment was insufficient to warrant dismissal of the indictment issued by grand jury that was improperly impaneled in judicial district other than one in which crime was committed.

3. Criminal Law ⇐617

Where no formal motion for continuance to gather evidence to satisfy requirement of showing that cognizable group of citizens had been systematically excluded from grand jury selection process through improper impaneling of grand jury in judicial district other than one in which crime was committed was ever made or ruled upon, but only a passing reference was made to possible need for continuance in body of defendant's memorandum supporting motion to dismiss for improper impaneling of grand jury, and defendant never followed up on such issue or mentioned continuance at omnibus hearing when motion to dismiss was argued, request for continuance was abandoned.

4. Indictment and Information ⇐10.2(9)

Rape ⇐57(1)

Evidence, including facts that defendant entered victim's home uninvited in early morning hours and undressed before entering her bed, was sufficient to take issue of attempted first-degree sexual assault to both grand jury and petit jury. AS 11.31.100(a), 11.41.41D, 11.41.470, 11.81.900(b)(40).

5. Grand Jury ⇐1

Grand juries are concerned with facts, not statutes.

6. Rape ⇐51(4)

Evidence of defendant's coercion in fondling victim's breasts was sufficient to sustain conviction of sexual assault in the second degree. AS 11.41.420(a).

7. Rape ⇐64

Sentence of seven years imprisonment with six years suspended upon conviction of

sexual assault in the second degree, which was substantially more favorable than presumptive term for defendant as a second offender, was not excessive. AS 11.41.420(b), 12.55.125(d).

Myron E. Angstman, Bethel, and Walter Share, Anchorage, for appellant.

Charles M. Merriuer, Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

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

OPINION

SINGLETON, Judge.

Gerald Nicholson was convicted of sexual assault in the second degree, AS 11.41.420, and sentenced to seven years' imprisonment with six years suspended. He was also fined. He appeals, raising four issues for consideration. (1) The grand jury was improperly impaneled in Anchorage rather than Kodiak. (2) The evidence presented respectively to the grand and trial juries was insufficient to establish attempted sexual assault in the first degree. (3) The trial court erred in instructing the trial jury on second degree sexual assault because it was not charged in the indictment and it is not a lesser-included offense of attempted first degree sexual assault. (4) The sentence is excessive.

We hold that the grand jury was improperly impaneled in Anchorage rather than Kodiak but Nicholson has failed to show prejudice. We find sufficient evidence of attempted first degree sexual assault to sustain the indictment and warrant presentation to a trial jury and hold that Nicholson could be convicted of second degree sexual assault on this record. We also hold that his sentence was not excessive. We therefore affirm Nicholson's conviction and sentence.

FACTS

K.R., age fifteen, and her sister, A.R., age fourteen, remained at their home in Dillingham

the night of June 10, 1980 and the early morning of June 11 while their parents were away from home commercially fishing. The two girls slept together in their parents' room. K.R. awoke at approximately 5:00 a.m. to find a naked Gerald Nicholson uninvited in bed with her, fondling her breasts, and kissing her. Taken by surprise, K.R. testified she hesitated for a moment, then jumped up, awakening A.R. who also immediately exited the bed. The frightened girls fled downstairs, armed themselves with butcher knives, telephoned a neighbor for help, and hid until the neighbor arrived. Nicholson was apprehended and identified.

While K.R. had seen Nicholson before, there is nothing in the record to suggest that he had reason to expect that K.R. would expect or welcome a visit from him during the early morning hours of June 11.

SITUS OF THE GRAND JURY

Nicholson accosted K.R. in Dillingham in Election District Thirteen in the Third Judicial District. Grand juries convened in Kodiak are established to consider offenses occurring in Dillingham. See Alaska R.Crim.P. 6(b)(1)(v). Thus, it appears that the Anchorage grand jury impermissibly heard Nicholson's case. *Peterson v. State*, 562 P.2d 1350, 1365-66 (Alaska 1977). The state attempts to avoid this conclusion by pointing to an order by the then presiding judge of the Third Judicial District which read as follows:

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT

In the Matter of Convening)
Grand Juries in the Third)
Judicial District)

ORDER

IT IS ORDERED that pursuant to Alaska Rule of Criminal Procedure 6(b)(2), Grand Juries may be convened in Anchorage, Alaska for crimes occurring in election districts 11, 12, 13 and 15 for the convenience of witnesses, defendants, other parties and for the court to provide for the expeditious resolution of criminal cases in the public interest.

DONE at Anchorage, Alaska this 1 day of July, 1980.

(SEAL)

Ralph E. Moody
Presiding Superior
Court Judge
Third Judicial
District

The state argues that this order permits Anchorage grand juries to hear evidence of any offense occurring in Election District Thirteen, at the apparent option of the district attorney, and is justified by Alaska Rule of Criminal Procedure 6(b)(2) which reads:

Special Sites. The presiding judge of a judicial district shall be empowered to call a special grand jury to be convened at a site other than the site designated in the preceding subsection, if the presiding judge determines that the designation of a special site is necessary in the interests of justice.

In *Peterson*, the court rejected this argument holding that an order by the presiding judge which establishes an alternate site for a grand jury to consider all offenses within a given election district exceeded the authorization provided in Criminal Rule 6(b)(2). 562 P.2d at 1365. We read *Peterson* to hold that a valid order under this subsection must address a specific case or specific subject for investigation and establish that factors differentiating that case or subject from typical cases warrants a special grand jury. Since the order in question did not address Nicholson personally, it could not authorize an Anchorage grand jury to hear his case.

[1] It could always be argued that grand juries in Anchorage cost the court system less and are more convenient for the district attorney's office than grand juries convened in Kodiak. These factors standing alone cannot justify a special grand jury under Criminal Rule 6(b)(2). We conclude that the presiding judge's order of July 1, 1980 violated Criminal Rule 6 and is, therefore, invalid.

[2] The *Peterson* court held that a dismissal of the indictment is not warranted for violations of Criminal Rule 6 unless the defendant establishes that a cognizable group of citizens has been systematically excluded from the grand jury selection process. The supreme court concluded that merely showing that a cognizable group exists and that such a group is underrepresented on the grand jury which returned

the indictment will not suffice. 562 P.2d at 1366. Here, Nicholson's showing parallels the showing found insufficient in *Peterson*. We therefore uphold the trial court's order denying dismissal of the indictment.

[3] Nicholson argues that he sought a continuance to gather evidence to satisfy the *Peterson* requirement and that the trial court abused its discretion in denying him a continuance for that purpose. No formal motion for a continuance was ever made or ruled upon. Nicholson made a passing reference to the possible need for a continuance in the body of his memorandum supporting his motion to dismiss. He never followed up on this issue or mentioned a continuance at the omnibus hearing when his motion to dismiss was argued. Therefore, we deem the request for a continuance abandoned.

We recognize that the order by the presiding judge relied upon by the state in this case violated Criminal Rule 6 as interpreted in *Peterson* in general and not only in this case. We also recognize that the showing that a cognizable group was completely excluded as required by *Peterson* will rarely be possible. For this reason, Nicholson argues that his indictment should be dismissed to insure future conformity to the rule. We do not believe such action is warranted at this time. We are confident that the superior court will henceforth follow *Peterson* and uniformly call grand juries at the designated sites to consider offenses arising within these election districts specified in Criminal Rule 6. We are further satisfied that the superior court will only utilize a special grand jury where the exigencies of a specific case demand it.

SUFFICIENCY OF THE EVIDENCE

[4] Nicholson argues that there was insufficient evidence to take the issue of attempted first degree sexual assault to either the grand jury or the petit jury. Nicholson did not testify. He argues, nevertheless, that his conduct would only support an inference that he wished to have sexual contact with a sleeping woman, i.e., fondle

her breast. He notes that uninvited sexual contact with a sleeping woman is not a crime under current Alaska law.

AS 11.31.100(a) provides:

A person is guilty of an attempt to commit a crime if, with intent to commit a crime, he engages in conduct which constitutes a substantial step toward the commission of that crime.

AS 11.41.410 provides in part:

(a) A person commits the crime of sexual assault in the first degree if,

(1) [B]eing any age, he engages in sexual penetration with another person without consent of that person. . . .

AS 11.41.470 provides in part:

(3) "[W]ithout consent" means that a person

(A) With or without resisting, is coerced by the use of force against a person . . . or by the express or implied threat of . . . imminent physical injury

Finally, AS 11.81.900(b)(40) provides:

"[P]hysical injury" means physical pain or an impairment of physical condition.

We believe a jury could reasonably infer that Nicholson intended to "penetrate" K.R. and that entering her bed naked and uninvited and fondling her were "substantial steps" toward the commission of that crime. We are satisfied that a jury could conclude that if Nicholson had intended only sexual contact, he would not have undressed before entering her bed and that if he did not intend to coerce her he would not have entered her home uninvited in the early morning hours when a jury could find that he knew her parents would be gone.

The issue of attempted first degree sexual assault was properly submitted to the grand jury and the petit jury. See *State v. Kekaulua*, 50 Hawaii 130, 433 P.2d 131 (1967); *People v. Shealy*, 51 N.Y.2d 933, 434 N.Y.S.2d 986, 415 N.E.2d 974 (1980).

Nicholson argues that he could not be convicted of second degree sexual assault because it was not mentioned in the indictment and is not a lesser-included offense of attempted first degree sexual assault.

[5] We agree that second degree sexual assault and attempted first degree sexual assault are both class B felonies, but the adjective "lesser" in Criminal Rule 31(c) refers to the relation between the elements of an offense not the relation between their penalties. Grand juries are concerned with facts, not statutes. See *State v. Thomas*, 525 P.2d 1092 (Alaska 1974). Under the cognate theory of lesser-included offenses generally followed in Alaska, see *Elisovsky v. State*, 592 P.2d 1221, 1226 (Alaska 1979), the facts found by the grand jury in this case should be examined to determine whether Nicholson had notice that he might be convicted of second degree sexual assault. Attempted sexual assault in the first degree and sexual assault in the second degree are closely related. Sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. We conclude that the grand jury proceedings gave Nicholson sufficient notice of the risk that he might be convicted of second degree sexual assault to satisfy due process. The evidence before the grand jury did not differ materially from the evidence at trial. We note that Nicholson had access to a transcript of the grand jury proceedings. Alaska R.Crim.P. 6(m). It is clear that the indictment for first degree sexual assault was premised on Nicholson's sexual contact with K.R. when she woke up.

[6] Nicholson argues that there was insufficient evidence to convict him of sexual assault in the second degree. AS 11.41.420(a) provides:

A person commits the crime of sexual assault in the second degree if he coerces another person to engage in sexual contact by the express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone or by causing physical injury to any person, regardless of whether the victim resists.

AS 11.81.900(b)(51) provides:

"[S]exual contact" means

(A) the intentional touching, directly or through clothing, by the defendant of

the victim's genitals, anus, or female breast; or

- (B) the defendant's intentionally causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast.

AS 11.81.900(a)(1) provides:

[A] person acts "intentionally" with respect to a result described by a provision of law defining an offense when his conscious objective is to cause that result.

Nicholson intentionally engaged in sexual contact when he fondled K.R.'s breast. He argues, however, that he did not "coerce her to engage in sexual contact." We disagree. The evidence supports a finding that Nicholson could reasonably foresee that K.R. would be momentarily stunned by fear caused by Nicholson's unexpected and uninvited entry into her bed, in the early morning hours, enabling him to continue to caress her after she awoke. She testified she was temporarily in shock, and that she was afraid he would hurt her. Under these circumstances, we believe that a jury could find that K.R.'s momentary acquiescence in Nicholson's fondling her breast was "coerced by an implied threat of imminent physical injury" and thus constituted second degree sexual assault.

SENTENCE

[7] Nicholson argues that his sentence of seven years with ~~six years~~ suspended is excessive. Sexual assault in the second degree is a class B felony. AS 11.41.420(b). The maximum sentence is ten years' imprisonment. Presumptive sentences are respectively four and six years for second and third felony convictions. AS 12.55.125(d). The trial court carefully considered the criteria established by our supreme court in *State v. Chaney*, 477 P.2d 441 (Alaska 1970). In suspending most of the sentence imposed, the trial court specifically addressed rehabilitation and emphasized Nicholson's need for alcohol counseling. We have reviewed the record in light of *Austin v. State*, 627 P.2d 657 (Alaska App.1981), and have concluded that the sentence imposed

was substantially more favorable than the presumptive term for a second offender, *Connors v. State*, 652 P.2d 110 (Alaska App. 1982), and was not clearly mistaken. *McClain v. State*, 519 P.2d 811 (Alaska 1974).

The judgment and sentence of the superior court are **AFFIRMED**.



Arthur K. WETTANEN, Appellant,

v.

STATE of Alaska, Appellee.

No. 6352.

Court of Appeals of Alaska.

Jan. 14, 1983.

Defendant was convicted in the Superior Court, Fourth Judicial District, Gerald J. Van Hoomissen, J., of assault in the first degree, and he appealed. The Court of Appeals, Singleton, J., held that defendant's feet, whether shod or unshod, were "dangerous weapons" within meaning of assault in the first degree statute, where defendant used them to kick the victim whom he had already knocked down and the victim thereby suffered two broken ribs and a punctured lung.

Affirmed.

1. Criminal Law ⇐1158(1)

In prosecution for assault in the first degree, trial court's finding that defendant caused the victim's physical injuries was not clearly mistaken. AS 11.41.200(a)(1).

2. Assault and Battery ⇐56

Defendant's feet, whether shod or unshod, were "dangerous weapons" within meaning of assault in the first degree statute, where defendant used his feet to kick

BILL NO: CS HB 344

DATE: February 29, 1988

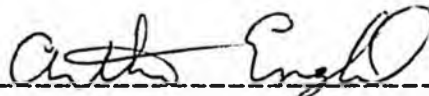
TITLE: An act relating to the protection of persons with disabilities and to disabled adults who are victims of physical or sexual assault

CONTACT: Barbara Miklos
Council on Domestic Violence and Sexual Assault
Department of Public Safety

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports CS for House Bill 344 (HESS).

Section 3 protects persons with disabilities, who are themselves unable to report, from continued physical or sexual assaults by requiring reporting of these crimes to law enforcement. Although we all want to believe that people would automatically report these crimes against people who are very vulnerable, this is not always true. Not only does this legislation require reporting, it makes the statement that protecting people with disabilities is a priority in Alaska. It is also important that advocates who are skilled in crisis intervention and trained in the issues of people with disabilities are available to assure that victims with disabilities are given the services they require to overcome the trauma of the assault and are protected from future assaults.



Arthur English
Commissioner

POSITION PAPER

CSHB 344

"An Act relating to the protection of persons with disabilities and to disabled adults who are victims of physical or sexual abuse."

EFFECT OF CSHB 344

Section 1 amends A.S. 09.65.150(a) to include responsibility for property damage incurred when a driver fails to yield for a physically disabled pedestrian so identified in this Section. "Property" under this Section could relate to the mobility aids and appliances utilized by the pedestrian.

Section 2 amends A.S. 11.76.130(a) and limits the crime of interference to those situations where the rights of a disabled person are intentionally prevented or restricted as described.

Section 3 requires certain professionals to report suspected criminal physical and sexual abuse of a disabled adult to the nearest law enforcement agency provided that the disabled adult is unable to report the abuse. CSHB 344 also provides immunity from liability and retaliation to the individual who is reporting the suspected abuse.

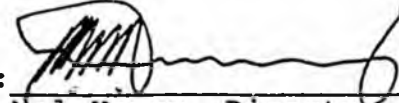
The bill appropriately distinguishes between those disabled people who are capable of reporting crimes themselves from those who cannot due to their disabilities. The former should be allowed to make their own decisions regarding reporting of crimes, while the latter must have assistance or they will go entirely unprotected.

Section 4 repeals A.S. 28.15.031(b) (4) which restricts the issuance of a driver's license if a person has a mental disability and has not been restored by the methods provided by law. This provision is unnecessarily restrictive and redundant. AS 28.15.031 (b) (5) provides the Department of Public Safety the authority to revoke or not grant a driver's license to a person with a mental or physical disability.

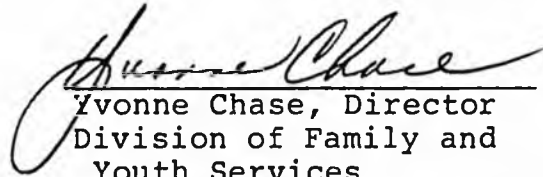
The Department of Health and Social Services (DHSS) supports CSHB 344. The department estimates that 312 reports of harm to disabled adults were received in 1986. Although DHSS attempts to respond to reports of abuse of disabled adults, DHSS currently does not have the necessary resources to provide an adequate level of adult protection services statewide. Further, this bill addresses reports of criminal conduct against adults which is appropriately investigated by law enforcement. The efforts of the two agencies working cooperatively in appropriate cases will further the protection available to disabled people.

CSHB 334 helps by providing a mechanism by which people who are aware of criminal physical and sexual abuse of disabled people are required to report these crimes to the appropriate law enforcement agency. In addition, CSHB 344 clarifies existing law with regard to interference with disabled persons.

Recommended by:

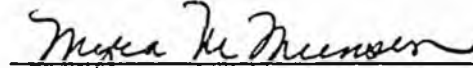


Mel Henry, Director
Division of Mental Health
and Developmental Disabilities



Yvonne Chase, Director
Division of Family and
Youth Services

Approved by:



Myra M. Munson
Commissioner
Department of Health
and Social Services

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 344 (HESS)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to the Protection of
Persons with Disabilities...
Sponsor: HESS COMMITTEE
Requestor: _____

Agency Affected: HEALTH and SOCIAL SERVICES
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

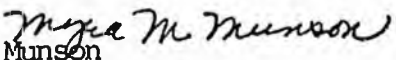
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Mel Henry, Director  Phone: 465-3370

Division: Division of Mental Health and Dev. Disabil. Date: 2/29/88

(P) Approved by Commissioner: Myra Munson  Date: 3/1/88
Agency: Health and Social Services

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

POSITION PAPER

HB 344

"An Act relating to the rights of physically and mentally disabled persons."

EFFECT OF House Bill 344

A.S. 09.65.150(a) is amended to include responsibility for property damage incurred when a driver fails to yield for a physically disabled pedestrian so identified in this Section.

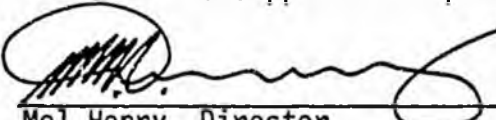
"Property" under this section could relate to the mobility aids and appliances utilized by the pedestrian.

A.S. 11.76.130(a) is amended to limit the crime of interference to those situations where the rights of a disabled person are intentionally prevented or restricted as described.

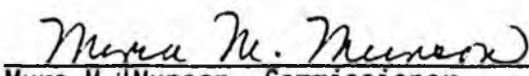
A.S. 28.15.031(b)(4) repeals existing statutory authority to restrict the issuance of a driver's license if a person has a mental disability and has not been restored by the methods provided by law. This need is already addressed in subsection (5).

RECOMMENDATION

The Department of Health and Social Services supports the passage of House Bill 344.

Recommended by: 
Mel Henry, Director

Date: 21st January, 1988

Approved by: 
Myra M. Munson, Commissioner

Date: Feb 1, 1988

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 344 (HESS)
PUBLISH DATE: HOUSE 2/17/88

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Health & Social Services
 Title: relating to the rights of physically and mentally disabled persons BRU: _____
 Sponsor: HESS Committee Components: _____
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	-0-					
TRAVEL	-0-					
CONTRACTUAL	-0-					
SUPPLIES	-0-					
EQUIPMENT	-0-					
LAND & STRUCTURES	-0-					
GRANTS, CLAIMS	-0-					
MISCELLANEOUS	-0-					
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

The enactment of HB 344 would have no direct fiscal impact on the Department of Health & Social Services.

Prepared by: Mel Henry, Director of Mental Health & D.D.
 Division: Division of Mental Health & Develop. Dis.

Phone: 465-3370
 Date: 1/21/88

Approved by Commissioner: Myra Munson
 Agency: Health & Social Services

Date: 2-1-88

Distribution (by preparer):

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

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: An act relating to the protection of persons w/ disabilities
Sponsor: HESS
Requestor: House Judiciary

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Barbara Miklos ^{ham} Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault Date: February 29, 1988
Approved by Commissioner: [Signature] Date: 2-29-88
Agency: [Signature]

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

HOUSE COMMITTEE REPORT

2/17

(7)

Date referred: 1/11/88

FURTHER REFERRALS:

Judiciary

DATE: 2-16-88

The Health, Education and Social Services Committee has considered HB 344

"An Act relating to physically and mentally disabled persons."

RECOMMENDS:

- replace with CS HB 344 (HESS) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact
- zero fiscal note
- zero with analysis
- same as previous fiscal note published _____
- same as previous zero fiscal note published _____

SIGNING DO PASS:

Phil Koppen
Alyce Stanley
Paul C. Kelly
John Ellis
Bill Hays
Mark Murrell
David Donley

SIGNING OTHER RECOMMENDATIONS:

John Ellis
 Co Chairman's signature
Phil F. Koppen

State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
HOUSE JUDICIARY
HOUSE RULES



P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3718
465-4968/4986

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

October 19, 1987

TO: REPRESENTATIVE NIILLO KOPONEN, CO-CHAIR HOUSE HESS
COMMITTEE
REPRESENTATIVE JOHNNY ELLIS, CO-CHAIR HOUSE HESS
COMMITTEE

FROM: MAX F. GRUENBERG, JR. *max*

RE: INTRODUCING "AN ACT RELATING TO PHYSICALLY AND MENTALLY
DISABLED PERSONS" AS A HESS COMMITTEE BILL

I would very much appreciate it if we could introduce the
attached draft bill as a HESS Committee bill.

This bill clarifies certain portions of SB 1, which was signed
into law by the Governor.

Section 1 of the bill requires the driver of a vehicle who
causes property damage to a physically disabled person's
property, such as a wheelchair, to pay for damages. There is
no provision in SB 1, now Chapter 69, SLA 1987, to compensate
a victim if his property is damaged or destroyed.

Section 2 clarifies AS 11.76.130(a) to require that a person
must intentionally interfere with the rights of a disabled
person to be guilty of a Class "B" misdemeanor. Thus, a
person repairing his sidewalk, for example, would not be
criminalized.

Both of these changes certainly reflect our legislative intent
in HB 172 last year, now SB 1, passed this year.

Section 3 removes a superfluous requirement for determining
eligibility for driver's licenses. The Division of Motor
Vehicles already under (5) of this section, retains the
ability to refuse a license or permit for a person with a
present mental disability. Many people have received

counseling or, at one time were mentally ill. Very few were legally adjudged incompetent. Fewer still were formally restored to competency by the methods provided by law. The mental health community strongly supports the repeal of AS 28.15.031(a)(4). Subsection (5) gives the DMV sufficient authority to protect the public.

I would like to make a motion at our Friday, October 23 meeting that the HESS Committee sponsor the bill and have it pre-filed.

If any committee member objects or requests any amendment (deletion or addition), please contact me at my law office, 276-6844, and I'll be happy to assist.

Thank you very much.

cc: All HESS Committee members



Association for Retarded Citizens of Alaska, Inc.

2211-A Arca Drive, Anchorage, Alaska 99508 • (907) 277-6677

January 23, 1988

Representative Peter Goll
513 Capitol Building
P.O. Box 4
Juneau, Alaska 99811

RE: House Bill 311
For an act entitled, "An Act Relating to Protection of Adults with
Disabilities who are Victims of Abuse, Neglect or Exploitation."

Dear Representative Goll:

I am writing this letter in behalf of the Board of Directors of the Alaska State Association of Retarded Citizens, who at its January 16, 1988 Board meeting unanimously supported the passing of House Bill 311.

The Alaska State Association for Retarded Citizens is comprised of families, consumers, and professionals all dedicated to speak out in behalf of the interests and rights of persons who are mentally retarded/developmental disabled. We feel that the bill will provide for the protection of those individuals who due to their disability are not able to speak out for themselves.

Again, our strong support for this bill is encouraged. If I can be of any further assistance, please do not hesitate to contact me at 277-6677.

Sincerely,

Mary Jane Starlings
Executive Director

Margaret R. Lowe, President
Board of Directors

MJS/sls
cc: Fran Ulmer



January 23, 1988

Representative Peter Goll
513 Capitol Building
P.O. Box V
Juneau, Alaska 99811

RE: House Bill 311
For an act entitled, "An Act Relating to Protection of
Adults with Disabilities who are Victims of Abuse, Neglect
or Exploitation."

Dear Representative Goll:

I am writing this letter in behalf of the Board of Directors of the Association of Retarded Citizens of Anchorage, who at its January 14, 1988 Board meeting unanimously supported the passing of House Bill 311.

The Association for Retarded Citizens of Anchorage provides residential services for persons who are mental retarded/developmentally disabled. We feel that this bill will provide for the following:

1. The assurance that adults with mental retardation will live in a safe program providing quality training leading to the least restrictive and most normalized setting possible.
2. That professionals in residential, vocational, respite and other services provided to adults with mental retardation who have reasonable cause to believe that an individual has suffered harm as a result of abuse, neglect or exploitation shall be afforded the opportunity and protection to report the harm to the Department of Health and Social Services.
3. That advocates, families, friends, and consumers who have reasonable cause to believe that an individual has suffered harm as a result of abuse, neglect or exploitation within a program in the State of Alaska has the opportunity to report the harm to the Department of Health and Social Services.

Representative Goll
JM: ARCA
DATE: January 23, 1988
PAGE: 2 of 2

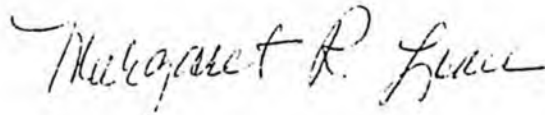
It is all of our responsibilities to advocate in behalf of the interests and rights of persons with mental retardation who may not have the ability to speak out in their own behalf because of their disabilities.

Again, our strongest support for this bill is encouraged. If I can be any further assistance, please do not hesitate to contact me at 277-6677.

Sincerely,



Mary Jane Starlings
Executive Director



Margaret R. Lowe, President
Board of Directors

MJS/sls
cc: Fran Ulmer



PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED

325 E. Third, Suite 400
Anchorage, AK 99501-2606
(907) 274-3658 TTD

127 S. Franklin
Juneau, AK 99801
(907) 586-1627 TTD

250 Cushman, Suite 3H
Fairbanks, AK 99701
(907) 456-1070 TTD

February, 27, 1987

Mr. Peter Goll
P.O. Box 581
Haines, Alaska 99827

Dear Representative Goll:

We are glad to respond to your request for suggestions for a bill which would protect vulnerable adults from abuse. For your review, we have enclosed a draft document which includes the ingredients we believe necessary for an optimal approach for legislation to remedy this problem

Most importantly, the draft document we offer establishes a penalty for care givers that do not report the abuse and neglect of people with Developmental Disabilities. This provision alone would do a great deal to rectify the current situation. As your bill moves through the legislature we hope the provision for a penalty can be maintained and passed into law.

We appreciate your concern about this serious situation and you can count on our support for your bill. Your interest and sponsorship for this measure will undoubtedly determine its success.

Again, we are pleased to assist you. Do not hesitate to call if we can provide more information.

Sincerely,

David F. Maltman
Executive Director

DFM:glf
Enc.

To: Representative Peter Goll

From: Protection & Advocacy for the Developmentally Disabled

Re: Abuse and Neglect of Vulnerable Adults

THE VULNERABLE ADULTS ACT

SECTION 1. LEGISLATIVE FINDINGS AND PURPOSE

The legislature declares the public policy of this state is to protect vulnerable adults who are physically or mentally disabled, to prevent them from suffering abuse, neglect, or exploitation at the hands of others including those responsible for their care, whether such care is in the home, in community settings, or in residential institutions. It is the purpose of this act to encourage the expeditious reporting and investigation of suspected abuse, neglect, or exploitation of disabled adults and facilitate the provision of protective services in appropriate circumstances, while protecting the civil and constitutional rights of disabled adults. Implicit in this chapter is the philosophy that whenever possible, family life should be strengthened and each adult should live in safe, sanitary conditions and live his own life without interruption from state government. Only when this principle should become impossible should legal proceedings be initiated in order to care for and protect such adults.

SECTION 2. REPORTS OF HARM, ABUSE, NEGLECT, OR EXPLOITATION OF VULNERABLE

ADULTS. (a) All persons coming in contact with a disabled adult, when they have reasonable cause to believe that the disabled person has suffered harm shall immediately report the harm to the Department of Health and Social Services. Persons required to report include, but are not limited to:

- (1) a physician or other health care provider;
- (2) a mental health professional as defined in AS 47.30.915(11)
- (3) a pharmacist;

(4) an administrator of a residential or health care facility or nursing home;

(5) a caretaker of the disabled person;

(6) a guardian or conservator;

(7) a police officer;

(8) a village public safety officer;

(9) a village health aide;

(10) a social worker;

(11) a member of the clergy;

(12) a staff employee of any program or project serving disabled persons;

(13) a licensed foster care provider;

(14) a paid employee of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;

(15) an employee of a homemaker program or home health aide program;

(16) an emergency medical technician or paramedic in the mobile intensive care program.

(b) A report of harm made under this section may include the name and address of the person reporting the harm and shall include:

(1) the name and address of the disabled person;

(2) information relating to the nature and extent of the harm;

(3) other information that the person reporting the harm believes might be helpful in an investigation of the case or in providing protection for the disabled person.

(c) A person who fails to report as required by this section is guilty of a class B misdemeanor.

(d) If immediate action is necessary to protect the disabled person from

imminent harm, the person shall make the report of harm to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the disabled person and shall, at the earliest opportunity, notify the department.

(e) A person who, in good faith makes a report of economic or physical harm to a disabled person under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability that might otherwise be incurred or imposed.

SECTION 3. RETALIATORY ACTION BY EMPLOYER PROHIBITED. No employer or supervisor may discharge, demote, transfer, reduce pay, benefits or work privileges, prepare a negative work performance evaluation or take any other action detrimental to any employee who files a report in accordance with the provisions for this act, by reason of such report. Any person making a report under this act shall have a civil cause of action for appropriate compensatory and punitive damages against any person who causes such detrimental changes in the employment status of the reporting party by reason of his making such report. There shall be a rebuttable presumption that any such detrimental change in the employment status of the reporter, if made within 90 days of the filing of a report under this act, is retaliatory.

SECTION 4. ACTION ON REPORTS. (a) Upon receiving a report of harm, the department shall within 24 hours initiate or cause to be initiated an investigation to determine the economic or physical condition of the disabled person named in the report and whether action or services are needed for the protection of the disabled person. The department or investigator shall

personally interview the disabled person during the investigation unless the disabled person is unconscious or otherwise physically or mentally impaired to such an extent as to be unable to respond to questions.

(b) The department or investigator shall prepare a written report of the investigation, including findings, recommendations, and a determination of whether and what kind of protective services are to be offered to the disabled person. Upon request, the person who reported harm to the disabled person shall be notified of the status of the investigation. The department shall provide to the Department of Law a copy of each report of an investigation of harm to a disabled person if the report of harm is confirmed to be true, for possible criminal prosecution. This section does not limit the authority of the Department of Law or the court to act to protect an adult under this act.

(c) The department shall immediately terminate an investigation under this section upon the request of a disabled person who is the subject of a report of harm. However, if the department has reasonable cause to believe that the disabled person is incapacitated, the department may petition the superior court under AS 13.26 for appointment of a guardian or temporary guardian for the disabled person for the purpose of obtaining consent to continue the investigation.

SECTION 5. PROTECTIVE SERVICES. (a) The department shall provide available protective services to a harmed disabled person if and to the extent to which the disabled person consents. If the department has reasonable cause to believe that the disabled person lacks the capacity to consent to receiving protective services, it may petition the superior court under AS 13.26 for appointment of a guardian or temporary guardian for the disabled person for the purpose of obtaining consent.

(b) If a disabled person who has consented to receiving protective services is prevented by a caretaker or any other person from receiving the services, the department may assist the disabled person to petition the superior court for an injunction restraining the caretaker from interfering with the provision of protective services to the disabled person.

SECTION 6. REVIEW AND REFERRAL. The department shall, not later than 90 days after initiating the provision of protective services to a disabled person, initiate a review of the case to determine whether continuation or modification of protective services that are being provided is warranted. The department shall reevaluate the case every 90 days thereafter until the case is closed.

SECTION 7. ACCESS TO REPORTS (a) Investigation reports and reports of harm filed under this chapter are confidential and are not subject to public inspection and copying under AS 09.25.110 - 09.25.125. However, in accordance with this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate governmental agencies inside and outside the state, in connection with investigations or judicial proceedings involving harm to a disabled person.

(b) Unless an investigation of a report conducted pursuant to this act determines that there is some credible evidence of the alleged abuse or neglect, all information identifying the subject of the report shall be expunged from the file and from the records of any office or agency of the department designated to investigate suspected abuse or neglect of disabled adults, within 90 days of the date of report.

(c) Within thirty days time subsequent to the completion of the

investigation, a subject of a report may request the department to amend, seal or expunge the record of the report. If the department refuses or does not act within a reasonable time, but in no event later than thirty days after such request, the subject shall have the right to a fair hearing to determine whether the record of the report in the file should be amended or expunged on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this act. The burden of proof in such hearing shall be on the department. In such hearing, the fact that there was a verified report of abuse or neglect shall be presumptive evidence that the report was substantiated. The department may make any appropriate order respecting the amendment or expungement of the record to make it accurate or consistent with the requirements of this act. Written notice of any expungement or amendment of any record made pursuant to the provisions of this act, shall be served upon each subject of such record.

(d) The department shall disclose a report of harm if the disabled person who is the subject of the report consents in writing. The department shall, upon request, disclose the number of verified reports of harm that occurred at a facility, program or home which cares for disabled persons.

(e) A public or private agency which has received an application for a certificate or license to receive, board or keep a disabled adult pursuant to applicable provisions of state law, shall inquire of the department and the department shall inform such agency, whether the applicant has been or is currently the subject of a verified report on file with the department pursuant to this act.

(f) A public or private agency or facility receiving, boarding, or keeping disabled adults shall inquire of the department and the department shall inform such agency or facility, whether any person who is actively being

considered for employment with adult care responsibilities has been or is currently the subject of a verified report on file with the department pursuant to this act.

(g) Any person who has applied for a certificate or license to receive, board or keep a disabled adult or who has applied to a public or private agency to be an employee with adult care responsibilities shall be notified by such agency at the time of application that the agency will inquire of the department whether such person has been or is the subject of a verified report of abuse or neglect. The agency shall notify the applicant of the department's response.

SECTION 8. QUARTERLY REPORT. The Department shall submit to Protection and Advocacy Systems of Alaska (AS 47.80.020) each quarter a statistical report of the Department's activities related to the protection of disabled persons in the state. The report may not disclose the identity of victims or perpetrators of the harm.

SECTION 9. AUTHORITY OF THE DEPARTMENT. In performing its duties under this chapter, the department shall, subject to the disabled person's consent, initiate actions necessary to assure the health, safety and welfare of a disabled person, including the transfer of the disabled person from a nursing home, residential care or health care facility.

SECTION 10. TRAINING. (a) A person employed by the state who is required under this chapter to report abuse, neglect, or exploitation of disabled persons shall receive training on the recognition and reporting of abuse and exploitation of disabled adults.

(b) Each department of the state that employs persons required to report abuse, neglect, or exploitation of disabled shall provide:

(1) initial training required by this section to each new employee during the employee's first six months of employment, and to any existing employee who has not received equivalent training; and

(2) appropriate in-service training required by this section as determined by the department.

(c) Each department that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with:

(1) laws relating to abuse, neglect, and exploitation of disabled adults;

(2) techniques for recognition and detection of abuse, neglect, and exploitation of disabled adults;

(3) agencies and organizations within the state that offer aid or shelter to victims of abuse, neglect or exploitation; and

(4) procedures for required notification of suspected abuse, neglect, or exploitation.

(d) Each department that must comply with (b) of this section shall file a current copy of its training curriculum and materials with the Council on Domestic Violence and Sexual Assault. A department may seek the technical assistance of the Council or the Department of Health and Social Services in the development of its training program.

SECTION 11. EVIDENCE NOT PRIVILEGED. No evidence regarding the abuse or neglect of the disabled adult shall be excluded in any proceeding arising out of the alleged abuse or neglect on the grounds of lack of competency under any portion of the Rules of Evidence.

SECTION 12. DEFINITIONS. (a) "abandonment" means desertion of a disabled person by a caretaker.

(b) "abuse" means: (1) intentional use of physical force, (2) non-accidental injury as a result of acts or omissions, mental anguish, or unreasonable confinement, (3) infliction of mental anguish, (4) unreasonable confinement, (5) nontherapeutic conduct which produces or could be expected to produce severe additional pain or injury and is not accidental, or (6) any repeated conduct which produces or could reasonably be expected to produce severe/additional mental or emotional distress.

(c) "caretaker" means: a person who is responsible for the care of a disabled person as a result of a family relationship, or who has assumed responsibility for the care of a disabled person voluntarily, by contract, or by court order;

(d) "department" means: the Department of Health and Social Services;

(e) "developmental disability" means a severe, chronic disability of a person which (1) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(2) is manifested before the person attains age twenty-two;

(3) is likely to continue indefinitely;

(4) results in substantial functional limitations in three or more of the following areas of major life activity: (a) self-care, (b) receptive and expressive language, (c) learning, (d) mobility, (e) self-direction, (f) capacity for independent living, and (g) economic sufficiency and

(5) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of life-long or extended duration and are individually planned and coordinated.

(f) "disabled adult" means: a person 18 years of age or older who

manifests a degree of impairment by reason of limited mental or physical function as a result of

- (1) a developmental disability,
- (2) accident,
- (3) illness
- (4) or any other cause.

(g) "exploitation" means: the illegal or improper use of a disabled adult or his resources for another person's profit or advantage;

(h) "harm" means abuse, neglect, or exploitation as defined in A,B,C;

(i) "neglect" means: the failure by the caretaker of a disabled person to provide services necessary to maintain the physical and mental health of the disabled person, including abandonment;

(j) "protective services" means services intended to prevent or alleviate harm resulting from abuse, neglect, or exploitation;

(k) "verified report" means a report made pursuant to this act if an investigation determines that some credible evidence of the alleged abuse, neglect, or exploitation exists.

AG/RG:bk

IN THE DISTRICT COURT FOR THE STATE OF ALASKA JUN 1 1985
THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 ARTIE R. COLLINS,)
)
 DOB: 1-22-60)
 Defendant.)
 _____)

I N F O R M A T I O N

HARASSMENT AS 11.61.120(a)(5)
ASSAULT IN THE FOURTH DEGREE
AS 11.41.230(a)(1)

Case No. 3VA-S85-118 CR.

THE DISTRICT ATTORNEY CHARGES THE FOLLOWING TWENTY-TWO
MISDEMEANOR COUNTS:

- COUNT 1 HARASSMENT
- COUNT 2 ASSAULT IN THE FOURTH DEGREE
(Victim - Raymond Greise)

- COUNT 3 HARASSMENT
- COUNT 4 ASSAULT IN THE FOURTH DEGREE
(Victim - Dale Carey)

- COUNT 5 HARASSMENT
- COUNT 6 ASSAULT IN THE FOURTH DEGREE
(Victim - Roger Robinson)

- COUNT 7 HARASSMENT
- COUNT 8 ASSAULT IN THE FOURTH DEGREE
(Victim - John Sheratine)

- COUNT 9 HARASSMENT
- COUNT 10 ASSAULT IN THE FOURTH DEGREE
(Victim - John Sheratine)

- COUNT 11 HARASSMENT
- COUNT 12 ASSAULT IN THE FOURTH DEGREE
(Victim - John Sheratine)

COUNT 13 HARASSMENT
COUNT 14 ASSAULT IN THE FOURTH DEGREE
(Victim - Richard Ross)

COUNT 15 HARASSMENT
COUNT 16 ASSAULT IN THE FOURTH DEGREE
(Victim - John Kameroff)

COUNT 17 HARASSMENT
COUNT 18 ASSAULT IN THE FOURTH DEGREE
(Victim - John Kameroff)

COUNT 19 HARASSMENT
COUNT 20 ASSAULT IN THE FOURTH DEGREE
(Victim - John Kameroff)

COUNT 21 HARASSMENT
COUNT 22 ASSAULT IN THE FOURTH DEGREE
(Victim - John Kameroff)

COUNTS 1 AND 2

That on or about October 8, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause Raymond Greise:

Count 1: offensive physical contact by hitting him in the head with a basketball.

Count 2 physical injury by hitting him in the head with a basketball.

Count 1 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 2 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 3 AND 4

That on or about October 8, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause Dale Carey:

Count 3: offensive physical contact by hitting him in the chest with a basketball.

Count 4: physical injury by hitting him in the chest with a basketball.

Count 3 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 4 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 5 AND 6

That on or about September to December, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause Roger Robinson:

Count 5: offensive physical contact by kicking him in the back of the legs knocking him to the ground.

Count 6: physical injury by kicking him in the back of the legs knocking him to the ground.

Count 5 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 6 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 7 AND 8

That on or about September to December, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Sheratine:

Count 7: offensive physical contact by kicking him in the back of the legs knocking him to the ground.

Count 8 : physical injury by kicking him in the back of the legs knocking him to the ground.

Count 7 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 8 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 9 AND 10

That on or about September to December, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Sheratine:

Count 9: offensive physical contact by tackling him to the floor.

Count 10: physical injury by tackling him to the floor.

Count 9 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 10 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 11 AND 12.

That on or about January to June, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause Richard Ross:

Count 11: offensive physical contact by kicking him in the buttocks.

Count 12: physical injury by kicking him in the buttocks.

Count 11 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

Count 12 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

COUNTS 13 AND 14

That on or about September to December, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause Richard Ross:

Count 13: offensive physical contact by kicking him in the chest, knocking him across the room.

Count 14: physical injury by kicking him in the chest, knocking Ross across the room.

Count 13 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 14 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 15 AND 16

That on or about the 18th day of September, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Kameroff:

Count 15: offensive physical contact by striking him in the chest with his fist, causing food to be lodged in his throat.

Count 16: physical injury by striking him in the chest with his fist, causing food to be lodged in his throat.

Count 15 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 16 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 17 AND 18

That on or about September, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Kameroff:

Count 17: offensive physical contact by kicking him in the stomach.

Count 18: physical injury by kicking him in the stomach.

Count 17 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 18 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 19 AND 20

That on or about the 1st day of October, 1984, at Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Kameroff:

Count 19: offensive physical contact by kicking him in the chest.

Count 20 : physical injury by kicking him in the chest.

Count 19 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 20 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 21 AND 22

That on or about the 7th day of October, 1984, at or near Valdez, in the Third Judicial District, State of Alaska, Artie R. Collins did unlawfully cause John Kameroff:

Count 21: offensive physical contact by kicking him in the stomach, knocking him into a sink.

Count 22: physical injury by kicking him in the stomach, knocking him into a sink.

Count 21 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 22 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

DATED this 6th day of June, 1985.

NORMAN C. GORSUCH
ATTORNEY GENERAL

DWAYNE W. MCCONNELL
DISTRICT ATTORNEY

BY: Eugene B. Cyrus
Eugene B. Cyrus
Assistant District Attorney

JUL 1 1985

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
ARTIE R. COLLINS,)
DOB: 1-22-60)
Defendant.)

Case No. 3VA-S85-118 CR.

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT

The undersigned, being first duly sworn upon oath,
deposes and states that:

1. I am a police officer for the Valdez Police
Department and have investigated both major and minor
crimes, including assault. On December 21, 1984, I was
assigned to conduct an investigation concerning allegations
of assaults at the Harborview Developmental Center located
in Valdez, Alaska.

COUNTS 1, 1A

2. On December 28, 1984, I conducted a taped
interview with Susan Ness, an employee of Harborview
Developmental Center. Ness stated that on approximately
October 8, 1984, she observed Collins strike resident
Raymond Griese in the head with a basketball. Ness stated
that Griese was seated on the floor cross-legged at which
time Collins looked around as if to see if anyone was
watching him, turned back towards Griese and threw the ball
with such force that Griese was knocked over backwards.
Ness further stated that it appeared to her that Collins
intended to cause Griese pain and discomfort in the manner
which he threw the ball. She also felt that the ball was
thrown in such a fashion that the impact was painful to
Griese and that Griese could have been injured as a result
of being struck with the ball.

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COUNTS 3, 2A

3. Susan Ness further stated that on approximately October 8, 1984, she observed Collins strike resident Dale Carey in the chest with a basketball. Ness stated that Carey was struck with such force by the ball that it knocked the wind out of him and Carey had to gasp for his breath. As a result of being struck with the ball Carey was knocked off balance. Ness stated that Carey was struck with such force that there was possibly reddening of the skin or even bruising. She felt that the blow to Carey's chest was painful.

5 6
COUNTS 5, 3A

4. On February 6, 1985, I conducted a taped interview with Larry Preer, a former employee of Harborview Developmental Center. Preer stated that he had observed Collins kick Roger Robinson between September 20, 1984 and December 15, 1984. Preer stated that Collins kicked Robinson in the lower legs causing him to fall. Preer stated also that Robinson was kicked in such a manner that the blow as well as the fall would have been painful.

7 8
COUNTS 7, 4A

5. Preer further stated that Collins kicked John Sheratine between September 20, 1984 and December 1, 1984. Preer stated that Collins had kicked Sheratine in the lower legs causing him to fall. Preer stated that Sheratine was kicked in such a manner that the blow, as well as the fall, would be painful.

9 10
COUNTS 9, 5A

6. Larry Preer also observed Collins knock John Sheratine off his feet. Sheratine had been walking and Collins tackled him. Sheratine fell forward to the floor. Preer stated Sheratine fell in such a fashion that the fall would have been painful and that Sheratine could have been injured as a result of the fall. Mr. Preer stated that he observed this on several occasions between September 20, 1984 and December 15, 1984.

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COUNTS 6, 6A

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2 7. On January 18, 1985, I conducted a taped
3 interview with Cindy Schecter, an employee of Harborview
4 Developmental Center. Schecter stated that from January,
5 1984, through the spring of 1984 she observed Artie Collins
6 kick Richard Ross numerous times. Schecter stated that
7 during the incidents where she observed Collins kick Ross,
8 Collins was forcing Ross to stand up. Collins would kick
9 Ross in the buttocks to make him stand up. Schecter also
10 stated during the interview that kicking Ross was approved
11 by Harborview administration. Schecter stated that in her
12 opinion Ross was kicked in such a manner that it would have
13 been painful.

13 14
COUNTS 7, 7A

14
15 8. Larry Preer further stated that he had been
16 employed as an intern from September 20, 1984 and December
17 15, 1984. Preer stated that Collins had come from the
18 showering area and had gone to Ross' bedroom. For unknown
19 reasons, Collins kicked Ross in the chest. Preer stated
20 that Collins struck Ross with such force that Ross was
21 knocked across the room striking the wall on the far side of
22 the room. Preer stated that Ross was kicked with such force
23 that the blow itself was painful and that Ross could have
24 been seriously injured.

15 16
COUNTS 8, 8A

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26 9. On December 22, 1984, I conducted a taped
27 interview with Keith Goldenberger, an employee of Harborview
28 Developmental Center. Goldenberger observed Artie Collins
29 strike John Kameroff in the chest on approximately September
30 18, 1984. Kameroff had left his residence hall and gone to
31 one of the other residence halls. While Kameroff was away
32 from Puffin Hall he stole a sandwich and returned with it.
33
34

1 He was still eating the sandwich when he was to be taken to
2 the toilet. Once inside the toileting area, Kameroff was
3 still chewing on part of the sandwich. At this time Collins
4 became upset with Kameroff for stealing the sandwich and
5 struck Kameroff in the chest with his fist. Goldenberger
6 stated that as a result of the blow to the chest Kameroff
7 began choking, fell to the floor and began turning purple.
8 Collins then walked away from the immediate area. Golden-
9 berger stated that once he realized Mr. Kameroff was choking
10 he called for Collins to return and give him assistance.
11 Kameroff was patted on the back several times in an attempt
12 to dislodge the stuck food. This did not dislodge the food
13 and a Heimlich maneuver was performed. This successfully
14 dislodged the food stuck in Kameroff's airway. Goldenberger
15 stated that Kameroff was struck by Collins with such force
16 that it was painful to Kameroff and that other serious
17 complications could have resulted from the food not being
18 dislodged.

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COUNTS ^{17 13}
9, 9A

10. On February 1, 1985, I conducted a taped
interview with Lori Dials, an employee of Harborview
Developmental Center. During approximately September of
1984, she observed Collins kick resident John Kameroff. To
the best of her recollection it was during dinner time.
John Kameroff was attempting to get to the table to eat,
however, it was not his turn. At this time Collins led
Kameroff away from the table but Kameroff returned. Collins
then kicked Kameroff in the stomach. Kameroff then left,
however, he later returned. Again Kameroff was kicked by
Collins. At this time Kameroff was kicked in such a manner
that he was slammed backwards and came into contact with the
wall. Dials stated that in her opinion both of the blows
were painful to Kameroff and would have been painful for

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anyone else being kicked in such a fashion. Dials further stated that as a result of these kicks there was a possibility for internal injuries of Kameroff.

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COUNTS 10, 18A

11. Wolfenden further stated that on approximately October 1, 1984, he observed Collins kick resident John Kameroff in the chest. Wolfenden stated he had just entered the hall to speak with another staff member, as he opened the door he observed Collins do a "spinning back kick to the chest of Kameroff". As a result of the blow, Kameroff was forced backwards several steps. Wolfenden stated that Kameroff was kicked with such force that it was painful to Kameroff and also would be painful for anyone else kicked in such a fashion. Wolfenden also stated that there was the possibility for serious injuries as a result of such a kick. Further, Wolfenden stated that Kameroff became upset and began hitting himself in the stomach and screaming as a result of the kick.

²¹ ²²
COUNTS 11, 11A

12. Dials further stated that on approximately October 7, 1984 she again observed John Kameroff being kicked by Collins. Dials stated at this time Collins and Kameroff were in the bathroom area. Dials stated that she came through the door and observed Collins kicking Kameroff in the area of the stomach. After the impact of the blow Kameroff was forced backwards and struck his back or buttocks into a sink. Dials felt that this was an abusive situation in nature. In her opinion it was painful for Kameroff and there was no reason that Kameroff should be kicked.

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DATED this 10 day of June, 1985, at
Valdez, Alaska.

I Ray Glass
Affiant

SUBSCRIBED and SWORN to before me this 10th
day of June, 1985.

James Christy
Notary Public for Alaska
My commission expires: 5/14/87

DISTRICT ATTORNEY, STATE OF ALASKA
P. O. BOX 1070, PALMERT, ALASKA 99605
PHONE (907) 740-9327

IN THE DISTRICT COURT FOR THE STATE OF ALASKA JUN 1 1985
THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)	
	)	<u>I N F O R M A T I O N</u>
Plaintiff,)	
)	
vs.	)	ASSAULT IN THE FOURTH DEGREE
	)	AS 11.41.230(a)(1)
JEFFREY STONE,	)	HARASSMENT AS 11.61.120(a)(5)
DOB: 10-9-59)	
Defendant.)	
_____	)	Case No. 3VA-S85-120 CR.

THE DISTRICT ATTORNEY CHARGES THE FOLLOWING TWELVE MISDEMEANOR COUNTS:

- COUNT 1 ASSAULT IN THE FOURTH DEGREE
- COUNT 2 HARASSMENT
(Victim - Dale Carey)
- COUNT 3 ASSAULT IN THE FOURTH DEGREE
- COUNT 4 HARASSMENT
(Victim - John Kameroff)
- COUNT 5 ASSAULT IN THE FOURTH DEGREE
- COUNT 6 HARASSMENT
(Victim - Carl Miller)
- COUNT 7 ASSAULT IN THE FOURTH DEGREE
- COUNT 8 HARASSMENT
(Victim - Roger Robinson)
- COUNT 9 ASSAULT IN THE FOURTH DEGREE
- COUNT 10 HARASSMENT
(Victim - John Sheratine)
- COUNT 11 ASSAULT IN THE FOURTH DEGREE
- COUNT 12 HARASSMENT
(Victim - Richard Ross)

DATED this 6th day of June, 1985.

NORMAN C. GORSUCH
ATTORNEY GENERAL

DWAYNE W. MCCONNELL
DISTRICT ATTORNEY

BY: Eugene B. Cyrus
Eugene B. Cyrus
Assistant District Attorney

COUNTS 1 and 2

That on or about September to December, 1984, in Valdez, Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause Dale Carey:

Count 1: physical injury by kicking him in the buttocks.

Count 2 : offensive physical contact by kicking him in the buttocks.

Count 1 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 2 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 3 and 4

That on or about August to October, 1984, in Valdez, Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause John Kameroff:

Count 3: physical injury by hitting him in the head with a basketball.

Count 4: offensive physical contact by hitting him in the head with a basketball.

Count 3 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 4 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 5 and 6

That on or about October 10, 1984, in Valdez, Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause Carl Miller:

Count 5: physical injury by kicking him in the back of the legs knocking him to the ground.

Count 6 : offensive physical contact by kicking him in the back of the legs knocking him to the ground.

Count 5 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 6 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 7 and 8

That on or about September to December, 1984, in Valdez, Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause Roger Robinson:

Count 7: physical injury by hitting him in the head with a basketball.

Count 8 : offensive physical contact by hitting him in the head with a basketball.

Count 7 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 8 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 9 and 10

That on or about September to December, 1984, in Valdez, Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause John Sheratine:

Count 9: physical injury by hitting him in the head with a basketball.

Count 10: offensive physical contact by hitting him in the head with a basketball.

Count 9 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 10 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNTS 11 AND 12

That on or about and between January to June, 1984, at or near Valdez, in the Third Judicial District, State of Alaska, Jeffery Stone did unlawfully cause Richard Ross:

Count 11: physical injury by kicking him in the buttocks.

Count 12: offensive physical contact by kicking him in the buttocks.

Count 11 is a Class A Misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

Count 12 is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

MAY 1 1985

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JEFFREY STONE,)
DOB: 10-9-59)
Defendant.)

Case No. 3VA-S85-120 CR.

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT

The undersigned, being first duly sworn upon oath,
deposes and states that:

1. I am a police officer for the Valdez Police
Department and have investigated both major and minor
crimes, including assault. On December 21, 1984 I was
assigned to conduct an investigation concerning allegations
of assaults at the Harborview Developmental Center located
in Valdez, Alaska.

COUNTS 1, 2

2. On February, 1985, I conducted a taped
interview with Larry Preer, a former employee of Harborview
Developmental Center located in Valdez, Alaska. Preer
stated that he had observed Stone throwing a basketball at
Dale Carey and striking Mr. Carey in the head. Mr. Preer
stated that if he or someone else was struck in the same
fashion that it would in fact be painful to them. Preer
stated that he observed this on one and maybe two occasions.
The one incident that he could recall, Carey was attempting
to leave the activity area of Puffin Hall when Stone began
shouting at Carey to return, at which time he did not and
Stone picked up the basketball and threw it rather hard,
striking Carey in the head. Preer was unable to give an
exact date of these incidents, however, he did state that
they had occurred between September 20, 1984 and December
15, 1984.

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3 4
COUNTS 3, 3A

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3. On January 24, 1985, I conducted a taped interview with Molly Ramos an employee of Harborview Developmental Center located in Valdez, Alaska. Ramos stated that between August 1, 1984 and October 1, 1984 she observed Stone throwing a basketball at John Kameroff. She observed the basketball striking Kameroff in the head and further stated that the ball was thrown with quite a bit of force. She did feel that the ball was thrown in such a manner that it was painful for Mr. Kameroff.

5 6
COUNTS 5, 3A

4. On December 28, 1984, I conducted a taped interview with Susan Ness, an employee of Harborview Developmental Center located in Valdez, Alaska. Ms. Ness stated that on October 10, 1984 she observed Stone kick resident Carl Miller. Ness stated that Miller was coming out of the cafeteria area as Stone walked by. She stated that she observed Stone kick Miller from behind, knocking him down to his knees. At this time Miller immediately put up his hands as though to indicate that he did not want to participate in that type of behavior. At this time Stone began punching him in the arm, telling him to get up. Miller continued to indicate that he wanted to be left alone, to get away. Ness indicated that she believed that the kick was to the back of the legs of Miller and that she felt that the incident was an intentional act on Stone's part. Ness further felt that the kick was painful and also as a result of him being knocked to his knees.

7
COUNTS 7, 3A 6

5. Preer further stated that he observed Stone strike Roger Robinson in the head with an inflated basketball. One particular incident that Preer was able to recall well, involved staff members and residents having a barbeque outside the institution. At this time Robinson, who would

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1 begin to wander away from the group, Stone would yell at
2 Robinson to return, when he did not come back right away,
3 Stone would pick up the basketball and throw it at Robinson
4 as hard as he could. Robinson was struck in the head with
5 this basketball. Preer felt that the basketball struck
6 Robinson with such force that it was painful to him. Preer
7 was not able to recall the exact date of this incident,
8 however, he stated it had occurred between September 20,
9 1984 and December 15, 1984.

10 ^{9 10}
11 COUNTS 5, 5A

12 6. Preer further stated that while the residents
13 of Harborview were having an outside barbeque outside the
14 institution he observed Jeffery Stone strike John Sheratine
15 in the head with a basketball. Preer stated that Sheratine
16 would begin to wander away from the group and Stone would
17 yell for Sheratine to return. When Sheratine did not return
18 right away, Stone would throw the basketball at Sheratine
19 striking him in the head. Preer stated that the basketball
20 was thrown in such a fashion that it was painful for
21 Sheratine and that Sheratine could have been injured as a
22 result of being struck in the head. Preer stated that he
23 has observed Stone strike Sheratine in the head on other
24 occasions also with a basketball. Preer stated that this
25 occurred between September 20, 1984 and December 15, 1984.

26 ^{11 12}
27 COUNTS 6, 6A

28 7. On January 18, 1985, I conducted a taped
29 interview with Cindy Schecter, an employee of Harborview
30 Developmental Center located in Valdez, Alaska. Schecter
31 stated that between January, 1984, and the late spring she
32 had observed Stone kick resident Richard Ross numerous
33 times. Schecter stated that Stone had kicked Ross
34

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1 in order to make him stand up. Schecter stated that Ross
2 was kicked hard enough to leave bruises and that she had
3 observed these on several occasions. Schecter further
4 stated that Ross was kicked hard enough to be subjected to
5 pain and that in fact it was painful to Ross.
6

7
8 DATED this 10 day of June, 1985, at
9 Valder. Alaska.

10
11 L. Ross Kline
12 Affiant

13
14 SUBSCRIBED and SWORN to before me this 10th
15 day of June, 1985.

16
17 Janice Christy
18 Notary Public for Alaska
19 My commission expires: 5/14/87

20
21 DISTRICT ATTORNEY, STATE OF ALASKA
22 808 SOUTH CHUGACH STREET, SUITE 3
23 PALMER, ALASKA 99645
24 907/745-5027
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JUN 18 1985

FILED IN TRIAL COURTS
State of Alaska
At Valdez

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

JUN 1 - 1985

THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)	
	)	<u>I N F O R M A T I O N</u>
Plaintiff,)	
)	
vs.	)	HARASSMENT AS 11.61.120(a)(5)
)	
STEVE STONE,	)	RECKLESS ENDANGERMENT
DOB: 10-27-53	)	AS 11.41.250(a)
Defendant.)	
_____	)	Case No. 3VA-S85-119 CR.

THE DISTRICT ATTORNEY CHARGES THE FOLLOWING FIVE MISDEMEANOR COUNTS:

COUNT 1 HARASSMENT (Victim - Michael Sockpick)

COUNT 2: HARASSMENT
COUNT 3 RECKLESS ENDANGERMENT
(Victim - Michael Sockpick)

COUNT 4: HARASSMENT
COUNT 5.: RECKLESS ENDANGERMENT
(Victim - Luke Foley)

DATED this 6th day of June, 1985.

NORMAN C. GORSUCH
ATTORNEY GENERAL

DWAYNE W. MCCONNELL
DISTRICT ATTORNEY

BY: Eugene B. Cyrus
Eugene B. Cyrus
Assistant District Attorney

COUNT 1

That on or about October, 1984, at Valdez, in the Third Judicial District, State of Alaska, Steve Stone, with the intent to harass or annoy, did unlawfully cause offensive physical contact to Michael Sockpick by taping his eyes, mouth, neck and chest in a mummified condition.

All of which is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNT 2

That on or about the Spring of 1983, at Valdez, in the Third Judicial District, State of Alaska, Steve Stone, with the intent to harass or annoy, did unlawfully cause offensive physical contact to Michael Sockpick, a non-ambulatory Harborview resident, by pushing him into a swimming pool causing him to submerge.

All of which is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNT 3

That on or about the Spring of 1983, at Valdez, in the Third Judicial District, State of Alaska, Steve Stone did unlawfully create a substantial risk of serious physical injury to Michael Sockpick, a non-ambulatory Harborview resident, by pushing him into a swimming pool causing him to submerge.

All of which is as Class A Misdemeanor offense being contrary to and in violation of AS 11.41.250(a) and against the peace and dignity of the State of Alaska.

COUNT 4

That on or about the Spring of 1983, at Valdez, in the Third Judicial District, State of Alaska, Steve Stone, with the intent to harass or annoy, did unlawfully cause offensive physical contact to Luke Foley, a non-ambulatory Harborview resident, by pushing him into a swimming pool causing him to submerge.

All of which is a Class B Misdemeanor offense being contrary to and in violation of AS 11.61.120(a)(5) and against the peace and dignity of the State of Alaska.

COUNT 5

That on or about the Spring of 1983, at Valdea, in the Third Judicial District, State of Alaska, Steve Stone did unlawfully create a substantial risk of serious physical injury to Luke Foley, a non-ambulatory Harborview resident, by pushing him into a swimming pool causing him to submerge.

All of which is as Class A Misdemeanor offense being contrary to and in violation of AS 11.41.250(a) and against the peace and dignity of the State of Alaska.

FILED IN TRIAL COURTS
State of Alaska
At Valdez

JUL 1 1985

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT VALDEZ

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 STEVEN STONE,)
 DOB: 10-27-53)
 Defendant.)

Case No. 3VA-S85-119 CR.

STATE OF ALASKA)
) ss.
 THIRD JUDICIAL DISTRICT)

AFFIDAVIT

The undersigned, being first duly sworn upon oath,
deposes and states that:

1. I am a police officer for the Valdez Police
Department and have investigated both major and minor
crimes, including assault. On December 21, 1984, I was
assigned to conduct an investigation concerning allegations
of assaults at the Harborview Developmental Center located
in Valdez, Alaska.

COUNT 1

2. On December 21, 1984, I conducted a taped
interview with Evelyn Fungcharoen, a registered nurse at
Harborview Developmental Center. Fungcharoen stated that
during the latter part of October, 1984, she had discovered
an incident of abuse at Harborview Developmental Center.
Fungcharoen stated that during her evening rounds, just
before bedtime for the residents, she had gone into the room
of Michael Sockpick and discovered him to have been taped up
with masking tape. Fungcharoen stated she observed that the
tape was wrapped about the head and feet of Sockpick, his
mouth was taped closed as well as his eyes. Fungcharoen
stated that Sockpick is subject to grand mal seizures and
that as a result of being taped up Sockpick was placed in a

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1 situation for potential serious complications. Fungcharoen
2 further stated that Steven Stone admitted to putting the
3 tape about the head and face of Mr. Sockpick.

4 3. On December 21, 1984, I conducted a taped
5 interview with Genelda Moore, an employee of Harborview
6 Developmental Center. Moore stated that during the latter
7 part of October 1984 she had observed Michael Sockpick with
8 masking tape wrapped about his head and face. Moore stated
9 that Sockpick's eyes were taped over, his mouth was taped
10 shut, he was essentially mummified except his nose was not
11 taped closed. Also, a wheelchair armrest was taped to one
12 of his arms and taped around his neck. Moore stated the
13 Sockpick was placed in a potentially dangerous situation due
14 to the fact that he is subject to grand mal seizures. Moore
15 also stated she talked to Steven Stone who admitted to her
16 that he had taped Sockpick.

17 4. On January 20, 1985, I conducted a taped
18 interview with Lori Duff, an employee of Harborview
19 Developmental Center. Duff stated that during the latter
20 part of October, 1984, she had observed Michael Sockpick
21 with masking tape wrapped about his head and face. Duff
22 stated that Sockpick's eyes and mouth were covered; she also
23 observed tape was around his neck and chest, with an armrest
24 from a wheelchair taped to his arm. Duff stated that while
25 she was in the room, she noted Sockpick to be making unusual
26 noises as though he was possibly having trouble breathing or
27 that he was extremely frightened. Duff further stated that
28 she felt Sockpick was placed in a potentially dangerous
29 situation due to the fact that he is subject to grand mal
30 seizures.

31 3 4 5
COUNTS 2, 24, 3, 34

32 5. On January 17, 1985, I conducted a taped
33 interview with Mary Mehlberg, an employee of Harborview
34 Developmental Center. Mrs. Mehlberg stated that during the

1 spring of 1983 she and Steven Stone were working in the
2 therapy pool at which time she observed Stone pull Michael
3 Sockpick and Luke Foley from their wheelchair and push them
4 into the water. Mrs. Mehlberg stated at this time neither
5 Sockpick nor Foley had a life jacket on. Further, that both
6 Sockpick and Foley are wheelchair patients and neither one
7 of them could have brought himself to the surface indepen-
8 dently or could float by himself without a life jacket.
9 Mehlberg stated that after Stone pushed the residents into
10 the water, he would go into the water and pull them out
11 after they had gone under. Mehlberg stated she felt this
12 was an extremely dangerous situation due to the potential
13 for drowning.

14 DATED this 10 day of June, 1985, at
15 Valdez, Alaska.

16
17 I. Sam Stone
18 Affiant

19
20 SUBSCRIBED and SWORN to before me this 10th
21 day of June, 1985.

22
23
24 James Christ
25 Notary Public for Alaska
26 My commission expires: 5/14/87

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PREVENTING ABUSE AND NEGLECT

VOLUME II

An Analysis of State Law and
Proposed Model Legislation



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Miami Shores, Florida



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PREVENTING ABUSE AND NEGLECT
VOLUME II
AN ANALYSIS OF STATE LAW AND
PROPOSED MODEL LEGISLATION

By Jules Kerness

April, 1984

Barry University Abuse & Neglect Prevention Project

Harvey Abrams, M.S.W., Principal Investigator
Elane Nuehring, Ph.D., Research Coordinator
Marilyn Zuckerman, M.S., Senior Research Associate

Prepared as part of Grant # 90DJ0003, U.S. Department of
Health and Human Services, Office of Human Development
Services, Administration on Developmental Disabilities and
National Center on Child Abuse and Neglect.

TABLE OF CONTENTS

	Page
Acknowledgements	iv
I. Introduction	1
II. Protection of Disabled Adults	5
A. Characteristics of Abuse and Neglect Prevention Systems	5
B. Review of State Adult Protection Laws	12
C. Table of State Adult Protection Laws	37
III. Child Protection Laws	47
A. What Should Be Included	47
B. Strengths and Deficiencies	48
C. Directions for Change	53
IV. Conclusion: Model Statutory Protections Needed	56
A. Disabled Adults	56
B. Children	57
C. Proposed Legislation	58
V. A Model State Code for the Protection of Disabled Adults from Abuse and Neglect	61
A. Overview and Commentary	61
B. Model State Code	74

ACKNOWLEDGEMENTS

We wish to thank Professor Robert H. Waters, J.D., University of Miami Law School, who contributed to the development of this document by locating the majority of the relevant statutes and drafting an early version of the monograph. He was assisted in his efforts by Scott Eisen, J.D., University of Miami, 1983.

We wish to further acknowledge the assistance of the following individuals who reviewed drafts of this document and offered important ideas and suggestions:

John Parry, Editor, Mental Disability Law Reporter
Robert L. Burgdorf, Jr., former Vice President,
Developmental Disabilities Law Project
Tom Birch, Legislative Counsel, National Child
Abuse Coalition

Several individuals within the Florida Department of Health and Rehabilitative Services were particularly helpful to us in this project, notably:

Charles Kimber, Director, Developmental Services
Program Office (DSPO)
Bob Roberts, Director, Planning and Evaluation, DSPO
James Jolley, Supervisor, Abuse Registry

Support and assistance was offered throughout the entire project by our two project officers at the U.S. Department of Health and Human Services, Office of Human Development Services: John Corrigan of the National Center on Child Abuse and Neglect, Administration on Children, Youth and Families and Alfred Rose of the Administration on Developmental Disabilities. Their efforts on our behalf are most appreciated.

The many revised versions of this document were expertly typed by Fran Vereb, Project Secretary, whose efforts we could not have done without.

Barry University Abuse and Neglect Prevention Project
Harvey Abrams, Principal Investigator
Elane Nuehring, Research Coordinator
Marilyn Zuckerman, Senior Research Associate
Jules Kerness, Program Consultant

PREVENTING ABUSE AND NEGLECT:

AN ANALYSIS OF STATE LAW AND PROPOSED MODEL LEGISLATION

I. INTRODUCTION

The problem of abuse and neglect of developmentally disabled residents of public and private institutions has been documented over the years in court cases, newspaper articles, special investigation reports and publications by advocacy organizations.* While many states have established mechanisms to protect such vulnerable persons from harm, these protections vary considerably in comprehensiveness, enforcement, and application from state to state.

In 1982, Barry University of Miami Shores, Florida, began an intensive study of one state's effort to protect developmentally disabled individuals from abuse and neglect, under a grant from the U.S. Department of Health and Human Services, Office of Human Development Services. The state was Florida, and the study included research on the administration of

*Developmental disability is defined by federal law (PL-95-602), Developmental Disability Act Amendments of 1978, as "a severe, chronic disability of a person which -

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age twenty-two;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated."

its Disabled Abuse Act, the operation of its Central Abuse Registry, and the delivery of training concerning abuse and neglect to staff of public and private residential facilities in Florida. An analysis was made of abuse and neglect reports over the last nine years, from nine selected residential facilities serving developmentally disabled persons. In addition to the information gathered in Florida, requests were made to the other forty-nine states for samples of exemplary training materials and administrative procedures from their abuse prevention systems. As part of the project, a survey was sent to the Protection and Advocacy Agency for Developmentally Disabled Persons (created pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act, P.L. 94-103) in each state, requesting information on the agency's activities in the area of abuse and neglect prevention and investigation. Reports on these various phases of the Barry University study have been completed.

This document represents one of the final products of the Barry project. It consists of (1) a comparative analysis of state laws which protect disabled persons from abuse and neglect, and (2) a model abuse/neglect reporting and protective services law based upon that analysis. Along with a staff training curriculum on abuse/neglect reporting, normalizing programs for developmentally disabled people, behavior management and aggression control techniques, the statutory analysis and model legislation will be disseminated throughout the fifty states and the District of Columbia to Governors' offices, state legislatures, developmental disabilities program offices, protection and advocacy agencies and others.

The analysis of state laws presented below is based upon a review of state statutes as of mid-1983. Legislative changes or new statutes being considered at the time of our search, may not be included in our analysis. We have attempted to locate all statutes on this subject, and we apologize if we have inadvertently overlooked any relevant legislation.

The first chapters of this monograph are devoted to analyzing existing state laws which provide for the protection of vulnerable individuals from abuse and neglect. Adult abuse and neglect reporting and protective service laws are discussed first. A presentation of recommended elements of such laws is made, followed by a review of the laws of the fifty states. A table charting provisions of adult abuse and neglect reporting and protective services laws by state, accompanies the analysis and provides information which allows for comparisons between and among states, as well as comparisons between individual states and the recommended elements.

A chapter on child abuse and neglect reporting laws reviews some of the extensive comparative literature already published in this field. It addresses itself to how existing laws in the fifty states comply with the recommended elements identified in the earlier discussion, and the extent to which existing laws provide coverage for children in residential care and for developmentally disabled children.

The monograph concludes with proposed model legislation for protection of disabled adults from abuse and neglect. Recommendations are also made for amending child abuse statutes

so as to improve protection of developmentally disabled children. The Barry University Abuse and Neglect Prevention Project offers these proposals in an effort to improve the quality of care and provide for the safety of all developmentally disabled individuals, particularly those in residential facilities.

II. PROTECTION OF DISABLED ADULTS

The purpose of this chapter is two-fold. First, it sets forth those statutory characteristics which, in the judgement of the Barry University Abuse and Neglect Prevention Project, are most significant and ought to be included in any state legislative scheme designed for the protection of adults against abuse and neglect. Second, the chapter reviews the adult abuse protection laws of the states, assessing how they measure up against our posited characteristics.

A. Characteristics of Adult Abuse and Neglect Protection Systems: What Should Be Included

A number of significant elements may be seen as constituting adequate abuse/neglect statutory protections. Identification of these elements is based upon review of state child protection statutes, which generally predate and often serve as the basis for adult abuse protection statutes; the Barry University analysis of state adult abuse reporting laws themselves; and similar studies of others.¹ The elements are:

(1) Clear operational definitions

(a) Abuse/Neglect. Definitions of abuse and neglect should be as specific as possible in delineating proscribed acts, giving little interpretative latitude to judges and administrators, and thereby minimizing inappropriate intrusions into individual privacy. Definitions also should not encompass more acts than the state's administrative mechanisms can deal with. And, for purposes of clarity and ease of administration, such definitions should not overlap one another - i.e., definitions of abuse should not embrace neglect.

(b) Applicability to Disabled, Including Developmentally Disabled Persons. Precise definitions of disability should make the protections granted by the statute applicable to the persons intended.

(c) Applicability of Statutory Protections to Persons Residing in the Community and in Institutional Settings. Protection against abuse and neglect should be afforded to all disabled persons, regardless of their circumstances of residence or conditions of care.

(d) Clear Definition of Persons Committing Alleged Acts of Abuse and Neglect. Statutory systems should make clear that suspected acts of abuse and neglect committed against the disabled person, by persons who are either voluntarily or by agreement responsible for the disabled person's care, should be reported and investigated, whether the care is provided in the disabled person's own home or in a residential facility, and whether or not the caretaker is related to the disabled person.

(e) Designation of Appropriate State and/or Local Agency Responsible for Investigation of Reports of Alleged Abuse and Neglect. Ideally, the agency investigating allegations of abuse and neglect should not, at the same time, be responsible for providing, supervising, or regulating care and services to the disabled person. (The National Center on Child Abuse and Neglect, as well as a number of state legislatures, have embraced this approach. See Chapter III for further details.)

(2) State Central Registry System

A twenty-four hour, seven-day a week toll free telephone hot

line should be established and connected to a state central register* of abuse and neglect, which would trigger investigation of alleged acts of abuse and neglect, as well as monitor and evaluate the conduct of investigations in order to assure the protection of disabled persons. Information held by the register, as well as all other person-specific data in states without registers, should be kept confidential, with access limited to a specific listing of approved persons and agencies, including, for example, courts, grand juries, and bona fide research organizations. The state law should also provide for expungement of identifying data in cases of unfounded reports, while maintaining aggregate data for statistical and analytical purposes; the sealing of records after appropriate time intervals; and fair hearing rights with respect to expungement, amendment, or sealing of records. Finally, appropriate penalties for releasing confidential information contrary to law, should be included.

(3) Mandated Reporters

All persons, including but not limited to all medical, social services, mental health, law enforcement and other professional personnel and agencies ordinarily coming into contact with disabled persons, including residential care staff, should be required to report all suspected cases of abuse and neglect, and appropriate penalties for non-reporting should be included in the state law.

* The terms registry and register will be used interchangeably throughout this monograph.

(4) Reporter Immunity from Liability

In order to encourage the maximum degree of good faith reporting under the statute, all persons reporting suspected cases of abuse and neglect should be held immune from any civil or criminal liability that might subsequently arise by reason of such action. Any individual suspected of abuse should not be granted immunity from liability.

(5) Specification of Contents of Abuse/Neglect Reports

The report of abuse and neglect, whether oral or in writing, should be as detailed as possible in order to facilitate speedy and efficient investigation. Such information as the following should be required by state law: the name and address of the person making the report, unless anonymity is desired; the name and address of the disabled person alleged to have been abused or neglected; identification of the person alleged to have committed the suspected act or acts, if known; identification of the caretaker of the disabled person, if different from the alleged abuser; information on the nature, extent of and circumstances surrounding the commission of the alleged acts; and information on prior acts of abuse and neglect. In addition, mandated reporters should be empowered, as appropriate, to take photographs and/or x-rays of areas of physical trauma as a necessary component of abuse reporting.

(6) Clear Reporting and Investigation Procedures

In order to encourage responsible, expeditious reporting, the state law should require the immediate filing of oral reports to the state central register. Written reports should

follow almost immediately (i.e., within 48 hours), in order to provide more complete information. Further, individuals who suspect that the death of a disabled person was due to abuse or neglect should file a report with a coroner or medical examiner, who should in turn report to law enforcement officials as appropriate. Investigation of reported acts of abuse and neglect should commence within twenty-four hours of the filing of the oral report, with provision for face-to-face contact with the disabled person in order to assure his or her personal safety. Investigation procedures should also include time limits (i.e., 90 days) to determine whether or not a report is "indicated" (i.e., that some credible evidence exists of the alleged act or acts of abuse or neglect).

(7) Education and Training of Reporters and Others; Cooperation of Other Agencies

The state law should incorporate provisions to encourage the reporting of suspected acts of abuse and neglect against disabled persons by requiring the state agency responsible for administering the disabled persons' protection system to conduct continuing publicity and educational programs for potential reporters, especially employees in residential institutions. In addition, the statute should provide for the cooperation of other state and local agencies in discharging the state agency's responsibilities under the adult protection statute.

(8) Emergency Intervention

The statute should provide for access to the disabled person

in cases of emergency, including judicial procedures to prevent the caretaker from interfering with the investigation of the alleged abuse or with the provision of emergency services.

(9) Specification of Protective Services

The state law should specify the protective services available to the disabled person, include a requirement to evaluate the need for care and services, and provide for securing appropriate services such as: residential care, financial benefits, medical services and supplies, legal services, and other protective services included in a state's Title XX comprehensive annual social services plan.

(10) Involuntary Service Provision, Due Process Protections

The state law should make clear that protective services are to be offered on a voluntary basis, unless the disabled person is deemed to lack the capacity to consent or is in immediate danger and is unable to protect himself. In such cases, protective services should be provided under appropriate judicial procedures, including provision for short-term (i.e., 72 hour) interventions, and with due process protections of the disabled person's civil and constitutional rights (notice of hearing, service of process, right to counsel, appointment of a guardian in appropriate circumstances, attendance at hearing, appeals, and the like). Further, in determining the need for involuntary services, the state law should require the courts to provide for and consider in so far as possible, a comprehensive evaluation of the service needs of the disabled person, and to order services and/or placements that are the least restrictive of the disabled

person's rights of self-determination, given the circumstances of the case.

B. Review of Adult Protection Systems: How the States Measure Up

Forty-four states have enacted either adult abuse reporting statutes or comprehensive adult protective services laws with due process protections of the rights of the disabled person. A breakdown of the provisions of these laws, by state, can be found in the Table of Adult Protection Laws, pages 37-39. The pattern of legislation in the states on this subject is as follows:

Ten state laws focus exclusively on the reporting and investigation of abuse and neglect:

Hawaii	Nevada	Oregon
Louisiana	New Jersey	Vermont
Minnesota	Ohio	Washington
Nebraska		

Three states have essentially protective services statutes:

Colorado	Maryland	Wisconsin
----------	----------	-----------

Twenty-nine states include elements of both abuse and neglect reporting/investigation and protective services in their laws:

Alabama	Kentucky	North Carolina
Arizona	Maine	Oklahoma
Arkansas	Massachusetts	South Carolina
Connecticut	Michigan	Tennessee
Delaware	Mississippi	Texas
Florida	Missouri	Utah
Georgia	Montana	Virginia
Idaho	New Hampshire	West Virginia
Iowa	New Mexico	Wyoming
Kansas	New York	

Two state laws contain only civil and penal sanctions against abuse and neglect:

Indiana	Rhode Island
---------	--------------

Six states have no abuse and neglect reporting/investigation or protective services statutes:

Alaska	Illinois	Pennsylvania
California	North Dakota	South Dakota

(1) Definitions of Abuse and Neglect

Of the forty-four state laws with some variation of statutory provision governing the protection of adults from abuse and neglect, thirty-eight have incorporated definitions of or use the terms, "abuse" and "neglect". Common differentiation of the two terms lies in the treatment of "abuse" as an active verb (i.e., to injure or damage someone) and "neglect" as a passive one (i.e., failure to do something, to leave something undone). Confusion and subsequent hair-splitting arise because abuse may sometimes include the intentional failure to do or provide something to or for a disabled person, and chronic patterns of neglectful action may also constitute abusive behavior.

As a result of this problem in definition, many state laws in the survey do not include clear and unassailable differentiations between abuse and neglect, and it may be fairly argued that it is difficult to do so. However, an approach adopted by at least a dozen states is illustrated by the State of Mississippi's Adult Protective Services Act, Chapter 498 of the Laws of 1982, which defines abuse as:

the willful infliction of physical pain, injury or mental anguish on an adult, the unreasonable confinement of an adult or the willful deprivation by a caretaker of services which are necessary to maintain the mental and physical health of an adult. (Mississippi Statutes, Section 43-45-5)

Neglect is defined as:

the failure of a caretaker to provide the services which are necessary to maintain the mental and physical health of an adult. (Mississippi Statutes, Section 43-45-5)

The Mississippi definitions are useful although its neglect definition does not deal specifically with the treatment needs of adults, a significant concern, particularly with respect to

developmentally disabled adults. (This pattern is repeated in many states.) Further, the statute contains the term "mental anguish" but makes no attempt at definition. Also, Mississippi includes the term "unreasonable confinement" under the definition of abuse which is, again, not explained. Several other states surveyed also include "mental anguish" and "unreasonable confinement" under abuse/neglect definitions. Some states do attempt to define the variously used term "mental anguish", "mental injury" or "psychological injury". (See for example South Carolina's Client-Patient Protection Act of 1979, Section 43-30-10.)

Other states seek to skirt definitional problems by subsuming under a common umbrella term, all prohibited acts or omissions constituting abuse or neglect. An example of this pattern may be seen in the Oregon statute (Oregon Revised Statutes, Section 410.610) which states as follows:

'Abuse' means one or more of the following:

- (a) Any physical injury caused by other than accidental means, or which appears to be at variance with the explanation of the injury.
- (b) Neglect which leads to physical harm through withholding of services necessary to maintain health and well-being.
- (c) Abandonment, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.
- (d) Willful infliction of physical pain or injury.

The introduction of unusual and vague terms and conditions appears in the Oregon law with the reference to abandonment (again not substantially defined). Still other terms included in various statutory definitions are "intimidation", "maltreatment", "endangerment", and "self-neglect" (here, in an obvious attempt

to protect disabled persons unable to care for themselves). Also, sexual abuse occasionally appears in definitions of abuse and neglect. However, none of these terms appear in sufficient numbers of state laws, nor in sufficient explanatory detail, to merit generalization.

However, of the thirty-eight states which define the terms abuse and neglect, twenty-nine also incorporate the phrase "exploitation" as a grounds for seeking state protection (sometimes as part of neglect definitions). As opposed to abuse and neglect, this term is commonly defined among the statutes reviewed, although some exceptions did appear. For example, New Hampshire defines exploitation as "the illegal or improper use of an incapacitated adult or his resources for another's profit or advantage." (See New Hampshire Revised Statutes Annotated, Chapter 161-D.2.) Also, the Alabama definition describes exploitation as "An unjust or improper use of another person or another person's resources for one's own profit or advantage or for the profit or advantage of another person" (Alabama Code, Section 38-9-2).

(2) Coverage

(a) Age Groups

The laws of the states governing the protection of adults from abuse, neglect and exploitation differ as to the age limitations used to define adults. As may be seen on the accompanying Table, thirteen states specify coverage at any age; nineteen states cover adults age eighteen and over; and thirteen states provide protections from abuse and neglect to persons sixty years of age and older. Tennessee and Virginia cover certain adults and aged persons, depending on conditions of disability. Numbers may not add because of duplicative coverage.

(b) Disabilities

Of particular significance is the fact that states generally base their coverage for various age groups upon the nature and extent of specific disabilities. In addition to the developmental disabilities referred to in five state laws, twenty-seven statutes provide coverage to those with physical or mental disabilities or impairments. These include frailties, infirmities and diseases caused by advanced age, which make certain persons unable to protect themselves from abuse, neglect or exploitation by others. Other states, particularly those with strong adult protective services statutes, provide protective services to physically or mentally disabled persons, regardless of the incidence of abuse or neglect.

Most of the states which include mental and physical disabilities in their specified coverage have reasonably brief definitions of the disabled adult entitled to statutory protection. For example, the state of Michigan defines an "adult

in need of protective services" as a "vulnerable" person, which term is described as:

a condition in which an adult is unable to protect himself or herself from abuse, neglect or exploitation, or endangerment because of mental or physical impairment or because of the frailties or dependencies brought about by advanced age. (Michigan Compiled Laws Annotated, Section 400.11)

However, a number of states are more detailed in their definitions of mental and physical disability. For example, Delaware's statute encompasses:

any physical or mental disability and shall include, but not be limited to mental retardation, brain damage, physical degeneration, deterioration, senility, disease, habitual drunkenness or addiction to drugs, and mental or physical infirmity. (Delaware Code Annotated, Section 3902)

Similarly the State of Florida, whose statute covers the aged and disabled, defines a "disabled person" as:

any person who suffers from a condition of mental retardation, epilepsy, cerebral palsy, mental illness, or other disability which causes the person to be substantially unable to protect himself from the abusive conduct of others.

Further, an aged person is defined by the Florida law as a:

person suffering from the infirmities of aging as manifested by organic brain damage, advanced age, or other physical, mental or emotional dysfunctioning to the extent that the person is impaired in his ability to adequately provide for his own care or protection. (Florida Statutes Annotated, Section 827.09, Subdivision 2)

Similarly, the state of North Carolina defines "disabled adult" as:

one who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy, or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances. (General Statutes of North Carolina, Section 108A-101)

(c) Developmental Disabilities

Developmental disabilities, which, it can be argued are subsumed under some of the broadly-drawn definitions just cited are specifically referred to in only five state statutes (Colorado, South Carolina, Washington, Wisconsin and Wyoming). Three of them have comprehensive and specific definitions of developmental disabilities based upon the federal definition included in the 1975 Developmental Disabilities Assistance and Bill of Rights Act (P.L. 94-103). The 1978 federal amendments to this law (P.L. 95-602) revised the definition of developmental disabilities making it functional rather than categorical. This current definition is on page one of this monograph. The three similar state definitions based upon the earlier federal law are reproduced below.

Colorado:

'Developmentally disabled person' means a person with a disability attributable to mental retardation, cerebral palsy, epilepsy or neurological impairment which may originate during the developmental period, which can be expected to continue indefinitely, and which constitutes a substantial handicap. (Colorado Revised Statutes, Section 26-3-101)

South Carolina:

Developmentally disabled person means any individual having a disability attributable to mental retardation, cerebral palsy, epilepsy or other neurological condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, which has continued or can be expected to continue indefinitely and substantially impairs the individual from adequately providing for his own care or custody. (South Carolina Code, Section 43-29-10)

and Wisconsin:

'Developmentally disabled person' means any individual having a disability attributable to mental retardation,

cerebral palsy, epilepsy, autism or another neurological condition related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual. The term does not include a person affected by senility which is primarily caused by the process of aging or the infirmities of aging. (Wisconsin Statute Annotated, Section 55.01)

The Washington statute covers only those developmentally disabled adults who have been adjudicated incompetent and in the Wyoming statute developmental disabilities are mentioned, but not defined.

(d) Specific Reference to Residential Institutions;
Definition of Caretaker.

Of the forty-four state laws, only nineteen have made specific reference to the abuse and neglect of persons in residential institutions. As indicated in the Table of State Laws, ten of the nineteen states have references to the care of adults in residential institutions of various sorts in their abuse/neglect reporting statutes. Specific statutory provisions of the other nine are indicated by footnotes to the Table. Four states (Arkansas, Maryland, New York and South Carolina) have enacted laws protecting adults in certain types of institutions, in addition to their abuse/neglect reporting and protective services statutes. In four states (Kansas, Minnesota, Mississippi and New Jersey) the only statutes this project could locate on this topic apply exclusively to adults in residential care institutions. One state, Montana, is in two categories with reference to adults in residential care, in its general statute as well as with separate statutory protections for

developmentally disabled persons in residential institutions.

Most states have incorporated fairly consistent definitions of caretaker of the disabled adult. The state of Kentucky is illustrative:

'Caretaker' means an individual or institution who has the responsibility for the care of the adult as a result of family relationship or who has assumed the responsibility for the care of the adult person voluntarily, or by contract or agreement. (Kentucky Revised Statutes, Section 209.020)

Similarly, the state of Georgia provides that a "caretaker" means:

a person who has the responsibility for the care of a disabled adult as a result of family relationship, contract, voluntary assumption of the responsibility, or by operation of law. (Georgia Code, Section 30-5-3)

The term "caretaker" has distinct usage in state law, particularly in the context of provisions establishing judicial interventions to prevent caretakers from interfering with investigations of abuse and neglect and/or the provision of protective services.

(3) Reporting and Investigation of Abuse and Neglect

(a) Central Registry System

Of the forty-four state laws, only fifteen statutes contain any provision relating to the establishment of a state central registry system to govern the reporting and investigation of allegations of abuse and neglect committed against adults. And few of these contain anything more than a passing requirement that a register system be created as a data source for cases of abuse and neglect. The state of Kansas is an exception and provides one of the better examples of a system that requires the maintenance of a "statewide register of the reports received, the findings, evaluations and the actions recommended" (Kansas Statutes Annotated, Section 39-1404).

Another exception is Florida which sets out comprehensive adult central registry provisions. It requires the establishment and maintenance of a:

central abuse registry which shall receive reports made pursuant to this section in writing or through a single statewide tollfree telephone number which any person may use to report known or suspected abuse, neglect, or exploitation at any hour of the day or night, any day of the week. The abuse registry shall be operated in such a manner as to enable the department [of Health and Rehabilitative Services] to:

1. Immediately identify and locate prior reports or cases of abuse, neglect or exploitation.
2. Regularly evaluate the effectiveness of the department's program for abused, neglected, or exploited persons through the development and analysis of statistical and other information. (Florida Statutes Annotated, Section 827.09, Subdivision 6)

Upon receipt of a report, the Florida registry is required to immediately notify local offices of the Department of Health and Rehabilitative Services about the report and any previous reports concerning the disabled person (Florida Statutes

Annotated, Section 827.09, Subdivision 6).

(b) Reporters

Thirty-seven of the state laws include some provision for mandatory or permissive reporting of allegations of abuse, neglect, or exploitation. Although there are variations (three states provide only for permissive reporting by any person; and sixteen states provide for mandatory reporting by any person) almost half of the state statutes embrace mandatory reporting requirements for specific groups of persons. The most frequently mentioned groups of mandated reporters include: physicians and related medical and health services personnel (twenty-four states); social services, mental health and other professionals (twenty states); and law enforcement officials (sixteen states). Only two states, Alabama and South Carolina, had a single group of required reporters - medical personnel. And where specific individuals are required to report, the state law usually also provides for permissive reporting by any person (fourteen states).

Requirements for mandatory reporting ordinarily would be deemed to supercede the privileged nature of communications between husband and wife and professionals and their clients, protected by state laws and professional practice. However, where required reporters are specified in state law, eleven states provide that the privileged nature of such communications, with the frequent exception of attorney-client communications, may not constitute grounds for failure to report or to otherwise cooperate under the statute.

(c) Reporting and Investigating Agencies

By far the most preferred statutory mechanism is to require reports of alleged acts of abuse, neglect and exploitation to be forwarded to and investigated by state and local social services agencies (thirty-three states have such a requirement and in eleven of these, reports can also be made to law enforcement officials). In thirty-one of the thirty-three laws the social services agency is the primary investigating body while in the other two states, the law enforcement agency is the investigating body. Further, law enforcement agencies also have investigatory roles in six of the states where the social service agency is the primary investigator, either as an alternative or supplement to the social services agency investigation.

In three states, reports of abuse and neglect are forwarded to an office for the aging and investigated by the same office, while in one other state, reports made to an office for aging are investigated by law enforcement officials. In a number of states, reports of abuse and neglect may also be made to such organizations as the state licensing agency, department of mental retardation, office of aging ombudsman, and designated private agencies.

It is noteworthy that two states, Nevada and Vermont, have enacted specific provisions to exclude investigations of abuse and neglect reports by the agency responsible for care or services to the disabled adult. The Nevada statute provides that:

If the report of abuse, neglect or exploitation involves an act of omission of the welfare division, aging services division or a law enforcement agency, the report must be

made to an agency other than the one alleged to have committed the act or omission. (Nevada Revised Statutes, Section 200.5093)

Similarly, Vermont law provides that:

If a report of abuse, neglect, or exploitation involves the acts or omissions of the commissioner of health [the designated investigating official] or employees of that department, then such reports shall be directed to the secretary of the agency of human services who shall cause the report to be investigated by staff of the departments of mental health, social and rehabilitation services or other appropriate staff other than staff of the department of health. (Vermont Statutes Annotated, Title 18, Section 1153)

(d) Immunities from Liability

Thirty-two states have enacted provisions granting immunity from liability in subsequent criminal or civil proceedings to persons reporting in good faith or otherwise cooperating under the statute. A number of states have qualified the granting of such immunities by exempting from the provision persons charged with or suspected of committing abuse or neglect. A few state laws are illustrative. The Arizona statute provides:

Any person making a complaint or providing information or otherwise participating in the program authorized by this chapter is immune from any civil or criminal liability by reason of such action, unless the person acted with malice or unless such person has been charged with or is suspected of incapacitating, abusing, exploiting or neglecting the adult in question. (Arizona Revised Statutes Annotated, Section 46-453)

Further, Idaho law contains the following provision:

Any person who makes any report pursuant to this chapter, or who testifies in any administrative or judicial proceeding arising from such report, or who is authorized to provide supportive or emergency services pursuant to the provisions of this chapter, shall be immune from any civil or criminal liability on account of such report, testimony or provision of services, except that such immunity shall not extend to perjury, reports made in bad faith or with malicious purpose nor, in the case of provision of services, in the presence of gross negligence under the existing circumstances. (Idaho Code, Section 39-5203)

Of further significance, at least five states (Florida, Kansas, Massachusetts, Minnesota and Tennessee) have established what are known as "whistleblower" protections (i.e., protecting an employee reporting suspected abuse and neglect from any retaliatory action on the part of his or her employer). The Massachusetts statute is illustrative:

No employer or supervisor may discharge, demote, transfer, reduce pay, benefits or work privileges, prepare a negative work performance evaluation, or take any other action detrimental to an employee or supervisor who files a report in accordance with the provisions of this section by reason of such report. (Annotated Laws of Massachusetts, Chapter 19A, Section 15)

Other statutes contain provisions to enhance the enforceability of the whistleblower protection. The laws of Tennessee state that:

Any person making a report under the provisions of this chapter shall have a civil cause of action for appropriate compensatory and punitive damages against any person who causes a detrimental change in the employment status of the reporting party by reason of the report. (Tennessee Code Annotated, Section 14-25-105)

The state of Minnesota contains still other provisions designed to discourage retaliatory action. Minnesota code provides that any facility or person retaliating against the reporter, because of the making of the report, is liable for actual damages and, in addition, a penalty of up to \$1,000. Moreover, the statute states:

There shall be a rebuttable presumption that any adverse action, as defined below, within 90 days of a report, is retaliatory. For purposes of this clause, the term 'adverse action' refers to action taken by a facility or person involved in a report against the person making the report or the person with respect to whom the report was made because of the report and includes but is not limited to:

(1) Discharge or transfer from the facility;

- (2) Discharge from or termination of employment;
- (3) Demotion or reduction in remuneration for services;
- (4) Restriction or prohibition of access to the facility or its residents; or
- (5) Any restriction of [patient or resident] rights. (Minnesota Statutes Annotated, Section 626.557, Subdivision 17)

(e) Specification of Contents of Reports

Although twenty-six state laws provide for specification of the contents of abuse and neglect reports, the amount of required detail varies from state to state. Often, the statutory provision is very brief. The state of Alabama provides an example of one of the less comprehensive statutory requirements. A report, in this case the written report, is to contain only:

- a. Name, age and address of such person.
- b. Nature and extent of injury suffered by such person.
- c. Any other facts or circumstances known to the reporter which may aid in the determination of appropriate action. (Alabama Code, Section 38-9-8)

At the other end of the spectrum lie state laws like those of Arkansas which require that abuse/neglect reports:

include the following information: names and addresses of the next of kin or persons responsible for care, if known; the person's age, sex, and race; the nature and extent of the injury, sexual abuse or negligence, including any evidence of previous injury, sexual abuse or negligence to the person; the names and addresses of persons responsible for injury, sexual abuse, or negligence, if known; family composition; the source of the report; the person making the report; his reporting source, including the taking of photographs and x-rays, removal or keeping of the person of the abused adult or notifying the coroner, medical examiner, and other information that the person making the report believes may be helpful in the furtherance of the purposes of this Act. (Arkansas Statutes Annotated, Section 59-1309)

Although not necessarily the best statute that could be envisioned, the Arkansas law clearly requires the sort of elaborative detail needed to conduct an efficient, expeditious investigation in order to protect the allegedly abused or neglected person and, if warranted, to identify the need for and

provision of appropriate services.

The Arkansas statutory provision makes reference to two important investigatory procedures: the taking of photographs and x-rays, and reporting to coroners and medical examiners. Such provisions are required in a number of other state adult protection laws, and in more comprehensive child abuse reporting statutes. Indeed, Section 59-1307 of the Arkansas statute, authorizes the required reporter to obtain, at public expense, color photographs of areas of trauma and, if medically indicated, to obtain radiological examinations.

Further, this statute, like those of a number of other states, also provides that any required reporter who has reasonable cause to believe a person died as the result of abuse or neglect, must report such fact to the appropriate medical examiner or coroner who, in turn, must accept the report for investigation and report his findings to the police, the appropriate district attorney, and other designated officials (Arkansas Statutes Annotated, Section 59-1306).

(f) Reporting and Investigatory Requirements and Procedures

Although, as indicated above, a large proportion of the state laws specify the content of abuse and neglect reports, only nineteen states have established specific reporting and investigatory procedures in connection with adult abuse and neglect. And in many of these nineteen statutes specific, time-limiting, reporting and investigation procedures are lacking. Indeed, none of the states with reporting and investigating requirements approach the degree of accountability provided for

in a number of child abuse reporting laws, especially in regard to establishing time limits for the completion of investigations.

In the states with some statutory reporting and investigation provisions, there is usually a requirement for the immediate filing of an oral abuse/neglect report, followed by a written report, with no time limitation specified. In a few states, investigations must take place immediately upon the filing of an oral report, but the prevailing pattern is for "prompt and thorough" investigations (some states use the word "evaluation", usually to connote an emphasis on protective service provision) "as soon as is practicable". The prescribed contents of an abuse investigation are usually sparse. Several state laws simply require that an investigation include "a visit to the person and consultation with others having knowledge of the facts of the particular case" (Georgia Code, Section 3-5-5). However, two states (Arkansas and Michigan) have incorporated comprehensive provisions with respect to the contents of investigations. The Michigan statute reads:

The investigation shall include a determination of the nature, extent, and cause of the abuse, neglect, exploitation, or endangerment; examination of evidence; identification, if possible, of the persons responsible for the abuse, neglect, exploitation or endangerment; the names and conditions of other adults in the place of residence; an evaluation of the persons responsible for the care of the adult, if appropriate; the environment of the residence; the relationship of the adult to the person responsible for the adult's care; an evaluation as to whether or not the adult would consent to receiving protective services; and any other pertinent data.

.... The investigation shall include an interview with the adult. The county department shall conduct the interview by means of a personal visit with the adult in the adult's dwelling or in the office of the county department, by telephone conversation, or by any other means that may be available to the county department ... The investigation may include a medical, psychological, social, vocational,

and educational evaluation and review. (Michigan Compiled Laws Annotated, Section 400.11b)

State laws often require notification of law enforcement officials (coterminous with and/or after the completion of investigations), as appropriate, as well as medical examiners, and provide for the taking of photographs and x-rays. However, as noted above, in no state are time frames prescribed for the completion of an investigation, although Massachusetts law does require the establishment of administrative time limits for completion of "assessments and evaluations and for the implementation of service plans" and further provides that in the case of an emergency, assessments must be completed within 24 hours of the receipt of the abuse/neglect report (Annotated Laws of Massachusetts, Chapter 18).

Finally, the survey of state laws revealed that a number of states, to encourage the making of abuse/neglect reports, provide that the reporter be notified of the findings of an investigation after the investigation has been completed.

(g) Confidentiality Provisions

Twenty-seven states, with and without central registry systems, provide statutory assurances that records and reports identifying individual persons will be kept confidential. However less than half of these (eleven states) specify the individuals and agencies entitled to access to confidential information. A handful of states permit access only on court order. Although variations exist, groups that are most often given access include: persons and agencies carrying out abuse/neglect investigations; persons authorized to provide

placement or services to the disabled adult; agencies responsible for the care or supervision of the disabled adult; state officials administering the statute; any person who is the subject of an abuse/neglect report (the disabled adult or the alleged abuser); courts or grand juries which determine that such information is necessary for determination of issues before them; bona fide research organizations which, in no event may release identifying information; state and local prosecuting officials; and guardians or counsels of the disabled adults.

Some interesting variations may be noted. One state, Florida, specifically prohibits the release of the name of the reporter to any person other than employees of the state agency responsible for protective services, the state central registry, or the appropriate state attorney, without the written consent of the reporter. Release is permitted to such parties only when deemed necessary to protect an aged or disabled person with the further proviso that the name of the reporter may not be disclosed (Florida Statutes Annotated, Section 827.09).

The Florida statute further permits use of confidential central register records for purposes of screening persons applying for approval or licensure of a facility caring for aged or disabled persons. Similarly, the state of Washington permits use of central register records for such purposes as well as for pre-employment screening for persons providing care or treatment to disabled persons (Washington Revised Code Annotated, Section 26.44.070). In contrast, the state of Vermont specifically prohibits confidential records from being made available "for employment purposes, for credit purposes or to a law enforcement

agency other than the state's attorney" (Vermont Statutes Annotated, Title 18, Chapter 22, Section 1155).

Beyond provisions for accessing confidential records, the state adult protection statutes are remarkably deficient with respect to provisions for the amendment, sealing and expungement of records, as well as for fair hearings to challenge inappropriate state action relating thereto. Only six states have some statutory protections in this area and four of these have enacted only expungement provisions (generally related only to unfounded reports). One state, Minnesota, provides for the destruction of substantiated reports seven years after the date of final entry in the case record. Other, unsubstantiated reports may be kept for two years under certain circumstances (Minnesota Statutes Annotated, Section 626.557, Subs. 7,11).

In only two states, Arkansas and Nebraska, were comprehensive fair hearing provisions in evidence. The Arkansas statute is perhaps the most detailed and is quoted in part:

At any time, subsequent to the completion of the investigation, but in no event later than ninety (90) days after the receipt of a report, a subject of the report may request the Director of the Department to amend, seal, or expunge the record of the report. If the Director refuses or does not act within a reasonable time, but in no event later than thirty (30) days after such request, the subject shall have the right to a fair hearing to determine whether the record of the report in the Central Registry should be amended or expunged on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this Act. The burden in such a hearing shall be on the Department and the appropriate adult protective services. Notice shall be given to all parties concerned, and in such hearings the fact that there was such a finding of adult abuse, sexual abuse, or negligence shall be presumptive evidence that the report was substantiated. (Arkansas Statutes Annotated, Section 59-1314)

(h) Penalties

Sixteen states have established misdemeanor penalties (generally \$500 fines or six months imprisonment) for failure to report as required by law. Additional misdemeanor penalties are prescribed in eleven states for intentionally making false reports, violating confidentiality provisions or otherwise violating provisions of the statute. Further, twelve states have included penalties for the commission of acts of abuse or neglect and eight of these have chosen to classify such acts as felonies.

In two of the states however, Indiana and Rhode Island, penalty provisions were the only statutory provisions for the protection of adults from abuse and neglect.

(i) Education and Training of Reporters and Others;
Cooperation of Other Agencies

In order to encourage and facilitate the reporting of abuse and neglect, it would seem appropriate that state laws incorporate provisions for the conduct of continuing education and publicity campaigns by the state agency responsible for administering the reporting and investigation statute. However, this provision was in evidence in only three states, Delaware, Minnesota and New Mexico. The Delaware statute contains only a general reference to citizen education programs concerning the needs of protective services clients and services available to them (Delaware Code Annotated, Section 3904). The Minnesota law is somewhat more targeted, requiring the commissioner of public welfare to establish an "aggressive program to educate those

required to report, as well as the general public about the requirements of this section using a variety of media" (Minnesota Statutes Annotated, Section 626.557, Subdivision 18). In New Mexico law, a public information program on adult abuse, neglect and exploitation, and the state's reporting and prevention system is required (New Mexico Statutes Annotated, Section 27-7-13).

To facilitate reporting, investigation and other responsibilities under law, twelve statutes contain reference to providing for and, in most cases, requiring the cooperation of other state and local, public and private agencies with the state agency responsible for the protection of adults, in the discharge of its duties.

(4) Protective Service Systems

(a) Specifications of Services

Of the state adult protection laws surveyed, thirty provide some specification of adult protective services for disabled adults, in functional terms, by the listing of discrete services, and/or by reference to applicable state laws or Title XX of the Federal Social Security Act. Services are referred to as "protective services", "essential services", "emergency services" as well as in other, like terms.

Services described in the state laws are sometimes limited to a few short phrases. Arizona defines protective services as:

a program of identifiable and specialized social services that may offer social services appropriate to resolve problems which have produced visible signs of incapacitation and abuse, exploitation or neglect. (Arizona Revised Statutes Annotated, Section 46.451)

Other state laws are more detailed. For example, the state of Florida defines protective services as:

those services, the objective of which is to protect an aged or disabled person. Such protective services shall include but shall not be limited to evaluation of the need for services, arrangements for appropriate living quarters, obtaining financial benefits to which the person is entitled, or securing medical and legal services. In those situations where exploitation, prevention of injury, and protection of the person and his property are at issue protective services shall include seeking the appointment of a guardian for the person or seeking protective placement. (Florida Statutes Annotated, Section 827.09, Subdivision 2)

Other illustrations, that detail discrete services, include the state of Delaware:

Protective services include but are not limited to:

- (1) Preliminary investigation and evaluation of reports of adults needing protective services, including a comprehensive social evaluation.
- (2) Medical and psychiatric evaluation, if necessary.
- (3) Social casework for the purpose of planning and providing services needed by the adult client.

- (4) Maintenance of the person in his own home through provision of home health care, homemaker services, day care and chore services.
- (5) Assistance in obtaining out-of-home services such as respite care, emergency housing, and placement in a rest-residential home.
- (6) Referral for legal assistance, information on establishing power of attorney or representative payee arrangements, and on guardianship of person or property; referral to the Office of Public Guardian; referral for medical assistance.
- (7) Transportation to and from service providers if necessary.
- (8) Other services consistent with this chapter.
(Delaware Code Annotated, Title 31, Section 3904)

(b) Involuntary Provision of Services; Emergency Intervention; Due Process Protection

More than half of the states (twenty-eight) contain provisions for the involuntary provision of protective services, including the ordering of protective placements, when the disabled person lacks the capacity to or is unable to consent to the provision of services. (In most state laws, protective services are otherwise offered and provided on a strictly voluntary basis.) In addition, twenty-four state laws contain provisions for emergency judicial intervention in order to protect the disabled person in imminent danger of serious harm or death. In such instances provisions are usually included for making short-term orders for services or placement (most often, for seventy-two hours) and for the filing of petitions for longer-term interventions, as appropriate. In such cases the laws also provide for judicial mechanisms to enjoin the caretaker from interfering with investigations and/or the provision of emergency services.

Within protective services proceedings, the laws in six states also provide that judicial orders be based on

comprehensive evaluation of the service needs of the disabled person, while ten statutes contain explicit reference to court-ordered services which are the least restrictive of the disabled individual's personal freedom and rights of self-determination. Indeed, several states explicitly provide that protective orders may not ordinarily commit disabled persons to mental institutions. Finally, in twenty-four state laws, due process protections are afforded the disabled person, generally including the appointment of counsel or guardian and, to greater and lesser extents in the various statutes, provisions for: notice of hearing; service of process; right to attend hearings, present evidence, cross-examine, and petition to set aside judicial orders; and appeals.

References Chapter II

1. See, especially: (a) Physical and Financial Abuse of the Elderly, Hearing before the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, U.S. House of Representatives, Ninety-Seventh Congress, First Session, April 3, 1981, San Francisco, California. Committee Publication No. 97-297. Washington, D.C.: U.S. Government Printing Office, 1981.

(b) Elder Abuse: The Hidden Problem, A briefing by The Select Committee on Aging, U.S. House of Representatives, Ninety-Sixth Congress, First Session, June 23, 1979, Boston, Massachusetts. Committee Publication No. 96-220. Washington, D.C.: U.S. Government Printing Office, 1980.

(c) Elyse Salend, Rosalie A. Kane, Maureen Satz, and Jon Pynoos, Elder Abuse Reporting: Limitations of Statutes. Los Angeles, California: UCLA/USC Long Term Care Gerontology Center, 1983.

C. TABLE OF STATE ADULT PROTECTION LAWS

DEFINES	COVERAGE SPECIFIED							REQUIRED REPORTERS							
	Abuse/Neglect	Exploitation	Developmental Disabilities	No Age	Age 18 +	Age 60 +	Other Disability	Residential Institutions	CENTRAL REGISTRY	Any person	Medical Personnel	Soc. Serv., Prof.	Law Enforcement	Permissive By Others	Appropriation of Priv. Comm.
Alabama	x	x			x			x			x				x
Arizona	x	x		x											x
Arkansas	x	x			x			x	2	x		x	x	x	x
Colorado			x		x										
Connecticut	x	x					x	x		x		x	x	x	x
Delaware					x			x			x				
Florida	x	x		x				x	x	x	x	x	x	x	x
Georgia	x	x			x			x							
Hawaii	x						x			x				x	x
Idaho	x	x					x				x				
Indiana	x							x							
Iowa	x	x		x						x					x
Kansas	x			x				x	3	x		x	x		x
Kentucky	x	x			x			x	x		x	x	x	x	x
Louisiana	x	x			x					x	x				
Maine	x	x			x			x	x			x	x	x	x
Maryland				x				x	4						
Massachusetts	x						x			x		x	x	x	x
Michigan	x	x			x			x	x			x	x	x	x
Minnesota	x				x			x	5			x	x	x	x
Mississippi	x	x			x				6		x				
Missouri	x	x					x				x				
Montana	x	x							7			x	x	x	x
Nebraska	x			x				x		x	x	x	x		
Nevada	x	x					x					x	x	x	x
New Hampshire	x	x			x			x		x		x	x	x	x
New Jersey	x	x		x					9	x	x	x	x		
New Mexico	x	x			x			x	x		x				
New York					x			x	9						
N. Carolina	x	x			x			x	x		x				
Ohio	x	x		x				x		x		x	x		x
Oklahoma	x						x	x			x				
Oregon	x						x			x		x	x	x	
Rhode Island				x				x							
S. Carolina	x	x	x	x				x	10			x			
Tennessee	x	x			x		x	x	x		x	x	x		x
Texas	x	x					x				x				
Utah	x	x			x			x	x		x	x			
Vermont	x	x					x		x	x		x		x	x
Virginia	x	x			x		x	x			x	x	x	x	x
Washington	x		x	x						x		x	x	x	x
W. Virginia	x	x		x											
Wisconsin			x	x				x							
Wyoming	x	x	x		1			x	x						x
Total States	38	29	5	13	19	13	27	19	15	16	24	20	16	17	11

	REPORT TO			INVESTIGATION BY				PENALTIES FOR							
	Social Service Agency	Law Enforcement Office	Aging Office	Other	Social Service Agency	Law Enforcement Office	Aging Office	Other	IMMUNITY FROM LIABILITY	REPORT CONTENTS SPECIFIED	REPORT PROCEDURES	CONFIDENTIALITY PROVISIONS	Failure to Report	Abuse/Neglect	Confidentiality/Other Violations
Alabama	x	x			x	x			x	x	x		x	x	
Arizona	x				x				x						
Arkansas	x				x				x	x	x	x	x	x	
Colorado															
Connecticut				x				14	x	x			x	x	
Delaware	x				x						x				
Florida	x				x				16		x	x	x	x	x
Georgia	x				x				x	x	x	x			
Hawaii	x				x				x	x		x			x
Idaho	x				x				x			x			
Indiana															x
Iowa	x				x				x						
Kansas	x				x				16	x	x	x			
Kentucky	x				x				x	x	x	x			
Louisiana	x	x			x	x	x	x		x	x		x		
Maine	x				x				x	x		x			x
Maryland															
Massachusetts				x			x	15	16	x	x	x	x	x	x
Michigan	x				x				x	x	x		x		
Minnesota	x	x		x	x			x	16	x		x	x	x	x
Mississippi	x				x				x	x			x	x	
Missouri	x				x					x					
Montana	x	x		x	x			x	x			x	x		x
Nebraska	x	x			x					x		x			x
Nevada	x	x		12	x	x		12	x	x	x	x			x
New Hampshire	x	11			x				x			x	x		
New Jersey	x				x			x	x	x	x	x			
New Mexico	x				x				x			x	x		
New York	x				x										
N. Carolina	x				x				x	x	x				
Ohio		x		x		x		x	x	x					
Oklahoma	x				x	x				x	x				17
Oregon	x	x			x	x			x	x	x	x			
Rhode Island															x
S. Carolina	x				x	x			x	x		x	x	x	x
Tennessee	x				x				16	x	x	x			
Texas				x			x		x	x	x	x			
Utah	x	x	x	x		x			x			x	x	x	
Vermont				13		x		13	x	x	x	x	x		x
Virginia	x				x				x		x	x			
Washington	x	x			x	x			x	x		x	x		x
W. Virginia												x			
Wisconsin															
Wyoming	x	x				x			x			x			x
Total States	23	12	4	6	31	10	4	9	32	26	19	27	16	12	11

	PROTECTIVE SERVICE SYSTEM						COOPERATION OF OUTIER AGENCIES, EDUCATION/TPNG, REPORTERS, ETC.	
	Specification of Services by Court Order	Involuntary Svc.	Least Restr. Svc.	Court Consider Eval. Svc. Consider	Due Process Protections Court Consider Needs	Emergency Inter- vention Proceed.		
Alabama	x	x	x	x	x	x		
Arizona	x							
Arkansas	x	x	x			x	x	
Colorado	x	x				x		
Connecticut		x				x		x
Delaware	x	x	x	x	x	x	x	
Florida	x	x					x	x
Georgia	x					x		x
Hawaii								
Idaho	x	x				x	x	x
Indiana								
Iowa		x				x		x
Kansas	x	x				x		x
Kentucky	x	x	x			x	x	
Louisiana		x						x
Maine	x	x				x	x	x
Maryland	x						x	
Massachusetts	x	x	x	x	x	x		
Michigan	x	x					x	x
Minnesota							x	x
Mississippi	x	x				x	x	x
Missouri	x	x				x	x	
Montana	x							
Nebraska								
Nevada	x							
New Hampshire	x	x						
New Jersey								
New Mexico		x					x	x
New York	x	x				x	x	
N. Carolina	x	x				x	x	x
Ohio							x	
Oklahoma	x	x	x	x	x	x		
Oregon								
Rhode Island								
S. Carolina	x	x	x	x	x	x		
Tennessee	x	x				x	x	
Texas	x	x				x	x	
Utah	x	x	x			x	x	
Vermont								
Virginia	x	x	x			x	x	
Washington								
W. Virginia	x	x				x	x	
Wisconsin	x	x	x	x	x	x		
Wyoming	x							
Total States	30	28	10	6	24	24	3	12

FOOTNOTES TO TABLE OF STATE ADULT PROTECTION LAWS

1. Age 16 or older
2. Not in general statute; separate statute prohibiting abuse of inmates in Arkansas State Hospital.
3. Statute applies exclusively to residents of adult care homes or certain medical facilities.
4. Not in general statute; separate statute for reporting of abuse of mentally retarded persons in residential facilities.
5. Statute applies exclusively to institutions.
6. Statute applies exclusively to residents of personal care homes.
7. In general statute; also separate statute prohibiting abuse of developmentally disabled persons in residential facilities.
8. Statute applies exclusively to residents of health care facilities, rooming houses or boarding houses.
9. Not in general statute; separate statute for reporting and investigating abuse of patients in residential health care facilities.
10. Not in general statute; separate statute for reporting abuse of patients or residents in institutions.
11. After working hours
12. County office of protective services
13. Department of health

14. Regional ombudsman
15. Designated public or private agency
16. Whistleblower protection included
17. Civil liability for false reporting

INDEX OF STATE STATUTES

<u>STATE</u>	<u>STATUTE</u>	<u>NAME OF STATUTE</u>
<u>Alabama</u>	Ala. Code ss 38-9-1 et. seq. (1977)	Protection of Aged Or Disabled Adults
<u>Arizona</u>	Ariz. Rev. Stat. Ann. ss 46-451 et. seq. (Supp. 1982-83)	Adult Protective Services
<u>Arkansas</u>	Ark. Stat. Ann. ss 59-601 et. seq. (1981)	Mistreatment of Incompetent Persons
	Ark. Stat. Ann. ss 59-1301 et. seq. (1983)	Abuse of Adults
<u>Colorado</u>	Colo. Rev. Stat. ss 26-3-101 et. seq. (1982)	Protective Services
<u>Connecticut</u>	Conn. Gen. Stat. Ann. ss 469-14 et .seq. (West 1977 & Supp. 1982)	Protection Of The Elderly
<u>Delaware</u>	Del. Code Ann. Tit. 31, ss 3901, et. seq. (1975 & Supp. 1982)	Adult Protective Services
<u>Florida</u>	Fla. Stat. Ann. ss 827-09 et. seq. (West. Supp. 1983)	Abuse, Neglect or Exploitation of Aged or Disabled Persons
<u>Georgia</u>	Ga. Code ss 30-5-1 et. seq. (1982)	Protection of Disabled Adults
<u>Hawaii</u>	Hawaii Rev. Stat. ss 349C-1 et. seq. (Supp. 1982)	Elderly Abuse or Neglect

<u>Idaho</u>	Idaho Code ss 39-5301 et. seq. (Supp. 1983)	Elderly Abuse, Exploitation, Neglect And Abandonment Reporting Act
<u>Indiana</u>	Ind. Code Ann. ss 35-46-1-1 et. seq. (Burns. Supp-1980)	Offenses Against The Family
<u>Iowa</u>	Iowa Code Ann. ss 235-B.1 et. seq. (1983)	Adult Abuse Services
<u>Kansas</u>	Kans. Stat. Ann. ss 39-1401 et seq. (1980)	Reporting Abuse or Neglect of Certain Persons
<u>Kentucky</u>	Ky. Rev. Stat. ss 209.010, et. seq. (1982)	Protection of Adults
<u>Louisiana</u>	La. Rev. Stat. Ann. ss 14:403.2 et seq. (West. 1982 Supp.)	Abuse and Neglect of Adults; Reports; Investigation; Central Registry; Waiver of Privileges; Penalties
<u>Maine</u>	Me. Rev. Stat. Ann. ss 3470 et. seq. (Supp. 1982)	Adult Protective Services Act
<u>Maryland</u>	Md. Ann. Code Art. 88A ss 106 et. seq. (1979 and Supp. 1982)	Adult Protective Act
	Md. Ann. Code ss 7-604 (1982)	Abuse Prohibited
<u>Massachusetts</u>	Mass. Ann. Laws Ch. 19A ss 14 et. seq. (Supp. 1982)	Abuse of Elderly Persons
<u>Michigan</u>	Mich. Comp. Laws Ann. ss 400.10 et. seq. (Supp. 1982)	Services To Adults And Aging Persons

<u>Minnesota</u>	Minn. Stat. Ann. ss 626.557 (1982)	Reporting of Maltreatment of Vulnerable Adults
<u>Mississippi</u>	Miss. Stat. ss 43-45-1 et. seq. (1982)	Adult Protective Services
<u>Missouri</u>	Mo. Rev. Stat. ss 660.250 et. seq. (Supp. 1982)	Protective Services For Adults
<u>Montana</u>	Mont. Code Ann. ss 53-5-101 et. seq. (1982)	Adult Services
	Mont. Code Ann. ss 53-20-163	Abuse of Residents Prohibited
<u>Nebraska</u>	Neb. Rev. Stat. ss 28-707 et. seq. (1982)	Offenses Involving the Family Relation
<u>Nevada</u>	Nev. Rev. Stat. ss 200.5091 et. seq. (1981 & Supp. 1983)	Abuse, Neglect and Exploitation of Older Persons
<u>New Hampshire</u>	N.H. Rev. Stat. Ann. ss 161-D:1 et. seq. (1981)	Protective Services To Adults
<u>New Jersey</u>	N.J. Stat. Ann. ss 30:1A-3 et. seq. (1979)	Suspicion of abuse or exploitation of resident of residential health care facility; report; immunity from liability for report or testimony; notice to ombudsman; evaluation; findings; recommended action; registry
<u>New Mexico</u>	N.M. Stat. Ann. ss 27-7-3 et. seq. (1984)	Adult Protective Services

<u>New York</u>	N.Y. Soc. Ser. Law ss 473 and 473-a et. seq. (McKinney Supp. 1982-83)	Adult Protective Services
	N.Y. Public Health Law ss 2803-d (McKinney Supp. 1982- 1983)	Reporting Abuses of Patients in Residential Health Care Facilities
<u>North Carolina</u>	N.C. Gen. Stat. ss 108A-99 et. seq. (1981)	Protection Of The Abused, Neglected or Exploited Disabled Adult Act
<u>Ohio</u>	Ohio Admin. Code ss 5123.61	Report Abuse or Neglect
<u>Oklahoma</u>	Okla. Stat. Ann. Tit. 43A ss 801 et. seq. (West 1980 Supp.)	Protective Services For The Elderly Act Of 1977
<u>Oregon</u>	Or. Rev. Stat. ss 410.610 et. seq. (1981)	Reporting Of Abuse Of Elderly Persons
<u>Rhode Island</u>	R.I. Gen. Laws ss 11-5-11 (Supp. 1982)	Assault On Mentally Retarded Persons
<u>South Carolina</u>	S.C. Code Ann. ss 43-29-10 et. seq. (1979)	Protective Services For Developmentally Disabled And Senile Persons
	S.C. Code Ann. ss 43-30-10 et seq. (1979)	Client-Patient Protection Act
<u>Tennessee</u>	Tenn. Code Ann. ss 14-25-102 et. seq. (1977 & Supp. 1982)	Adult Protection
<u>Texas</u>	Tex. Rev. Hum. Res. Code Ann. ss 48.001 et. seq. (1982)	Protective Services For the Elderly

<u>Utah</u>	Utah Code Ann. ss 55-19-1 et. seq. (1983)	Adult Protective Services
<u>Vermont</u>	Vt. Stat. Ann. Tit. 18 ss 1150 et. seq. (1979)	Report Of Abuse, Neglect and Exploi- tation of Older Vermonters
	Vt. Stat. Ann. Tit. 33 ss 3601 et. seq. (1968 & Supp. 1982)	Protective Services For Mentally Retarded Persons
<u>Virginia</u>	Va. Code ss 63.1-55.1 et. seq. (1983)	Protective Services For Aged And Infirm Persons
	Va. Code ss 63.1-55.2 et. seq. (1980 & Supp. 1983)	Protection Of Aged or Incapacitated Adults; Definitions
<u>Washington</u>	Wash. Rev. Code Ann. ss 26.44.010 et. seq. (1982)	Abuse of Children and Adult Develop- mentally Disabled - Protection - Procedure
<u>West Virginia</u>	W. Va. Stat. Art. 6 ss 9-6-1 et. seq. (1981)	Social Services for Adults
<u>Wisconsin</u>	Wisc. Stat. Ann. ss 55.001 et. seq. (West Supp. 1982)	Protective Service System
<u>Wyoming</u>	Wyo. Stat. ss 35-20-101 et. seq. (1983)	Adult Protective Services Act

III. CHILD PROTECTION LAWS

A. What Should Be Included

As indicated in the preceding chapter, ten major characteristics have been posited as necessary for the creation of an optimal statutory system designed to protect disabled adults from abuse and neglect. With the exception of the last two of these characteristics -- dealing with the provision of protective services to adults and with the invocation of judicial interventions with respect to involuntary protective services -- the remaining eight are equally applicable to state laws protecting children, including disabled children, from abuse and neglect.

To reiterate, such characteristics include:

- clear operational definitions (abuse/neglect; applicability of definitions to disabled persons; applicability of protections to persons residing in community or institutional settings; clear definitions of persons committing alleged acts of abuse and neglect);
- a state central registry system;
- a detailed listing of mandated reporters;
- provisions for reporter immunity from liability;
- specification of the contents of abuse/neglect reports;
- clear reporting and investigation procedures;
- provisions for emergency intervention; and
- provisions for the education and training of reporters and the cooperation of other agencies in implementing the state law.

And, obviously with respect to the provision of child protective services to the child and family, both voluntarily and within the context of judicial intervention, additional statutory provisions would need to be included to complete any scheme of state statutory protection for children.

B. Strengths and Deficiencies

Considerable research has been conducted in recent years to assess the comprehensiveness and adequacy of child abuse protection laws of the various states, and which may be used to generally compare existing state laws with many of the characteristics noted herein. Two such studies and their findings will be discussed here: a 1979 study by the U.S. Department of Health Education and Welfare (DHEW) and a 1980 study by the Ohio State University College of Social Work.

Of major significance is the 1979 DHEW study entitled Child Abuse and Neglect: State Reporting Laws.¹ It surveyed key elements of the child abuse and neglect statutes of the 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico and the Virgin Islands in effect as of January 1, 1979, and points to growing trends in the development of increasingly comprehensive state child abuse protection laws during the decade of the 1970's:

Most prominent among these [trends] is the expansion of the categories of mandated reporters and a broadening of the concepts of reportable abuse and neglect. Another trend shows the extension of immunity to reporters and the imposition of criminal and civil sanctions for failure to report. A growing number of states now are directing reports of abuse and neglect to social services agencies and mandating the operation of central registries, with specific requirements for access to records and penalties to ensure confidentiality. Another significant trend in this area is the

legislative requirement that a guardian ad litem be appointed by a court to independently represent the best interest of the child in abuse and neglect proceedings. States also have begun, through their legislation, to mandate or encourage the use of multidisciplinary child protection teams. 2

Within this summary context, the federal review of state laws indicates that comprehensive protections of children against abuse and neglect are not always uniform among states. Utilizing the major characteristics of abuse and neglect protection laws posited above, the findings of the HEW study followed by those of the Ohio State study and other research are presented below.

(1) Definitions

(a) Statutory definitions of abuse and neglect, as in the adult abuse protection statutes reviewed earlier in this report, are widely disparate and often replete with vague terminology.

(b) While the vast majority of jurisdictions set the age limit for reportable children at 18 years or younger, only a small handful make any specific reference to disabled children.

(c) With respect to investigation of institutional abuse and neglect, sixteen states and four jurisdictions have developed legislation to insure independence in investigations, and others have adopted administrative procedures to implement this standard.

(2) Central Registry System

(a) Forty-four jurisdictions have provided for some sort of statutory central registry system (and seven others maintain registers as matters of administrative policy), with considerable variation as to what categories of information are placed in the registry. 3

(b) A majority of states have statutory provisions declaring the confidential nature of child abuse records, typically establishing misdemeanor penalties for breach of confidentiality provisions (federal requirements in order for a state to qualify for grants). State codes usually regulate access to child abuse and neglect records to specified groups of individuals and agencies (similar to those described above in adult abuse reporting statutes).

(c) Twenty states with central registries provide in their reporting laws for destruction, sealing, expungement or amendment of information in these data systems. Circumstances necessitating such action vary from state to state, and only a few jurisdictions require that persons listed in the central registry be told they are in the data system.

(d) Some ten jurisdictions give subjects fair hearing rights with respect to requests for amendment, sealing or expungement of records.

(3) Reporters

(a) The majority of states provide for mandatory reporting of abuse from teachers and other school personnel, physicians, nurses, other medical and social services personnel and similar professionals; and more than half of the jurisdictions require reporting from coroners or medical examiners. Further, nineteen jurisdictions mandate "any person" or "any other person" to report; and thirty-two jurisdictions provide specific authorization for permissive reporting of child abuse and neglect.

(b) The states provide for the abrogation of privileged

communications in varying patterns, although the majority provide for abrogation of the physician-patient and husband-wife privileges.

(c) Forty-five jurisdictions impose penalties for failure to report child abuse and neglect.⁴

(4) Immunity from Liability

Consistent with eligibility requirements for state grants under the federal Child Abuse Prevention and Treatment Act, all fifty-five jurisdictions grant civil or criminal immunity from liability for the making of a report. Most jurisdictions provide additional immunity for participating in judicial proceedings resulting from the report.

(5) Reporting and Investigation Procedures

(a) Some twenty-six states provide for the taking of photographs or x-rays of injury to a child.

(b) Although most states provide statutory reporting and investigation procedures, there is considerable variation (also found in adult abuse reporting laws) in time frames and specificity required "although the trend in recent years has been to develop specific guidelines for the investigation".⁵ However, more than twenty-five jurisdictions currently name the state or local social services department as the sole receiver of child abuse reports.

(6) Education and Training of Reporters

A growing number of jurisdictions have statutory provisions providing for the education and training of reporters and for the

development of public information programs about child abuse and neglect.

(7) Emergency Intervention

Most jurisdictions authorize police to remove from the home a child in imminent danger of extreme abuse. A growing number of states extend this protective custody power (usually for only 24 to 72 hours, or until the next session of a family or juvenile court) to child protection agencies and hospitals.

(8) Due Process

The states provide, in varying degrees, for the appointment of a counsel or guardian ad litem to represent the interest of the child in court proceedings, and for legal representation for indigent parents and child protection agencies.

(9) Protection of Children in Institutions

Against this background, the Ohio State University College of Social Work undertook a 1980 study of state child abuse statutes and state licensing requirements with particular emphasis upon the protection of children in residential institutions.⁶ The study found very limited recognition of the existence of the issue of child abuse within state licensing statutes and regulations. With respect to state child abuse reporting statutes themselves, the Ohio State group discovered a similar pattern: state laws traditionally emphasize protection of children from intrafamilial abuse and neglect (with courts interpreting such coverage as generally applicable only to family settings). And, in this context, only fourteen states have

included abuse of children in residential institutions within their systems of statutory protections.

(10) Recognizing the Treatment Needs of Disabled Children

Our own review of state child protection laws as of mid-1983 revealed another disturbing characteristic (also in evidence, in varying degrees in the adult abuse laws as described above). Statutory definitions of child neglect generally speak in terms of the deprivation of food, shelter, medical care and services required for the health and welfare of the child. However, the laws do not specifically recognize the treatment needs of disabled, including developmentally disabled, children.

One state, Mississippi, in its Youth Court Act (Section 43-21-1-5) does contain a definition of neglect which looks to the treatment needs of the disabled child although it is not tailored specifically for the developmentally disabled child. It provides in part, that a neglected child is one:

who for any reason, lacks the special care made necessary for him by reason of his mental condition whether said mental condition be mentally retarded or mentally ill...

C. Directions for Change

The laws of all fifty states do provide some measure of protection for children against abuse and neglect, unlike the states' less comprehensive record in the protection of disabled adults. However, to remedy the omissions and deficiencies indicated above, state child abuse laws can, in varying degrees, be strengthened through amendments to include many of the provisions of the model code for the protection of disabled

adults presented later in this report.

In offering a model statute, the Barry University Abuse and Neglect Prevention Project is cognizant that an excellent model for child abuse reporting legislation has already been advanced by the National Center on Child Abuse and Neglect (NCCAN).⁷ However, our code will differ from the NCCAN model in several respects, and state legislatures may utilize elements of each to improve their statutory protections of children against abuse and neglect.

References Chapter III

1. National Center on Child Abuse and Neglect, Child Abuse and Neglect: State Reporting Laws. DHHS Publication No. (OHDS) 80-30265. Washington, D.C.: U.S. Department of Health, Education and Welfare, December, 1979.
2. Ibid., p. 27.
3. The report also noted: "Proponents of the central registry, however, acknowledge the widespread failure of the systems in fulfilling their 'diagnostic, case monitoring and statistical functions'." Ibid., p. 20.
4. The report notes however: "Despite the widespread provision of penalties, there are no reported cases of a criminal prosecution for failure to report an abused or neglected child." Ibid., p. 15.
5. Ibid., pp. 18 - 19.
6. Nolan Rindfleisch, Beverly Toomey and Rhonda R. Rivera, Child Abuse/Neglect In Residential Facilities: The Law And The Courts. Columbus, Ohio: Ohio State University, College of Social Work, NCCAN Grant No. 712664, 1980.
7. National Center on Child Abuse and Neglect, Child Protection: A Guide For State Legislation. Washington, D.C.: U.S. Department of Health and Human Services, 1983.

IV. CONCLUSION: MODEL STATUTORY PROTECTIONS NEEDED

A. Disabled Adults

The statutes of the states as described in this study, fail to uniformly protect disabled adults from abuse and neglect. What has been revealed by the statutory analysis is that state laws:

1. often contain imprecise and overlapping definitions of abuse and neglect;
2. fail to cover all age groups in many cases;
3. extend coverage to disabled adults, but define disabilities with varying degrees of comprehensiveness;
4. rarely make specific reference to developmentally disabled adults;
5. make statutory protections applicable to adults in residential care institutions less than half the time;
6. infrequently contain requirements for a state central registry system and even when required, rarely contain comprehensive procedures for the operation of such a system;
7. usually include listings of mandated reporters;
8. generally specify that social services agencies receive and investigate reports of abuse and neglect but rarely contain provisions to avoid self-investigation;
9. generally include provisions granting reporters immunity from civil and criminal liability by reason of good-faith reporting and in several cases, contain "whistleblower" protections;

10. do not consistently require detailed abuse and neglect reports or comprehensive and specific reporting and investigation procedures;
11. usually provide for the confidentiality of identifying information but do not consistently include procedures for gaining access to confidential information, and only rarely contain provisions relating to amendment, sealing and expungement of records, and fair hearings relating thereto;
12. less than a third of the time, provide misdemeanor penalties for failure to report or for the commission of acts of abuse and neglect;
13. rarely mandate the education and training of required reporters, or the cooperation of appropriate state and local agencies in implementing the adult protection statutes;
14. usually specify services to protect disabled adults from abuse and neglect; and
15. approximately, half of the time, contain provisions for involuntary protective services by judicial order, and in varying degrees, provide for emergency intervention with due process protections.

B. Children

Child abuse protection statutes have also been shown to include a number of significant deficiencies, namely failure to include institutional care within the purview of state protective efforts or to specify the treatment needs of developmentally disabled children within definitions of neglect. Such matters are deserving of consideration by the states in evaluation of

their child protective services statutes which, for the most part have been uniquely designed to protect the child and provide supportive and rehabilitative services to the family, either voluntarily or through appropriate court intervention. As such, attention to the protection of developmentally disabled children from abuse and neglect must be met within the context of such statutes and not through adult protection laws.

C. Proposed Legislation

The remainder of this monograph will set forth a model state code for the protection of disabled adults from abuse and neglect. It is a model cognizant of the strengths and deficiencies of existing state laws governing the protection of both children and adults and draws upon the best examples, in the judgement of the Barry University Abuse and Neglect Prevention Project, of these existing state laws and already published model statutory systems.

The decision was made to draft a model statute which provides protection from abuse and neglect for disabled adults rather than for adults and children for several reasons.

First, as discussed earlier, all fifty states have legislation mandating the reporting of child abuse and neglect. While some of these statutes may not provide coverage to children in residential institutions, or specify the special needs of developmentally disabled children, still the framework of legislation is already in place. What is needed in such states is not new legislation, but rather amendments to expand coverage. The model law we are proposing in this monograph does

offer definitions and other provisions which may be used to amend present child abuse reporting laws.

Secondly, the National Center on Child Abuse and Neglect has a model child abuse reporting law which can suggest language and other provisions to meet certain state needs for legislative improvement.

Further, while fifty states have child abuse and neglect reporting laws, only forty-four have some kind of adult abuse coverage, and many of those are lacking in several of the recommended characteristics of such laws. Moreover many states only cover persons over age sixty or have otherwise limited coverage. Thus, we feel the need is greater for an abuse and neglect reporting/protective services statute which covers disabled adults.

Lastly, we felt we could not recommend one statute to cover both children and adults, because the protective services provisions and judicial remedies and protections in such legislation would be significantly different for children and adults.

In drawing the code, major emphasis has been placed not only upon clarity and comprehensiveness in detailing statutory provisions to protect disabled adults, but also upon their potential for enforcement given practical, fiscal and state of the art considerations among the states.

It is the intention of the Barry University project to recommend needed legislation which will provide protections from abuse and neglect for all developmentally disabled individuals, both children and adults. While offering a complete disabled

adult statute, we are meeting a need existent in many states across the country. To improve child abuse reporting statutes so as to adequately cover developmentally disabled children and particularly those in residential care, we refer legislators to both the model child abuse reporting legislation developed by the National Center on Child Abuse and Neglect referenced earlier, or to those portions of the legislation proposed in this monograph which are appropriate and applicable.

V. A MODEL STATE CODE FOR THE PROTECTION OF DISABLED ADULTS
FROM ABUSE AND NEGLECT

A. Overview and Commentary

The following model state code draws to a significant degree upon the experience of the states as set forth in earlier chapters. Its focus, as stated in section two of the code, is clearly to facilitate the expeditious reporting and investigation of suspected cases of abuse and neglect of disabled adults as well as to provide protective services consonant with the rights of the individual. Sufficient statutory detail has been included in the code to clearly guide, and limit, state rule making.

It should be noted that experience under child protective reporting laws in the states as well as a growing body of professional literature argue in favor of a strong statutory reporting system as a powerful tool to protect vulnerable individuals against abuse and neglect.¹ The existence of mandatory reporting requirements and procedures combined with public education and an efficient state central register system, are believed to encourage the fullest degree of reporting of abuse and neglect as well as the provision of needed protective services. It is for these reasons that our model code contains as it does a heavy emphasis upon the reporting and investigation of abuse and neglect.

(1) Definitions

Section three of the code, the definitions section, presents many of the ground rules for the ensuing statutory materials and

is significant both for its inclusions and omissions.

Definitions of abuse and neglect have been developed with a view to avoiding vague and often confusing terms found in present state laws. Narrowly constructed definitions are presented to facilitate interpretation and administration and, consequently, the protection of disabled adults. In particular, the abuse definition covers only the infliction of physical injury affecting the person's physical or emotional condition (terms which are defined in section three, subdivisions two and three). It does not include non-physical injury as embraced by such terms as "verbal abuse" or "harassment" found in some state laws. These terms are difficult to define and enforce within the context of a state reporting law. Where they have not already done so, states are encouraged to develop and implement appropriate administrative mechanisms for state operated, licensed or regulated facilities, programs and services to prevent and remediate such practices.

Similarly, the model code sets forth a fairly rigorous definition of neglect phrased in the context of failure to provide care and service necessary to maintain the physical and mental health of the disabled adult. Of significance, the neglect definition clearly includes the failure to provide the special care, treatment and supervision which may be required for the disabled adult. The code excludes from the definition of neglect the term "self-neglect", nor does the definition section embrace "exploitation". These terms, although important and certainly deserving of state intervention, are also difficult to

interpret and enforce and, indeed, are better addressed elsewhere in state law and regulation.

Pursuant to subdivisions six and seven of the definitions section of the code, the term disabled adult is defined to include persons over eighteen years of age who suffer from a broad range of enumerated disabilities, including developmental disabilities, which are themselves defined drawing upon federal law.

As provided in subdivision four, the focus of the statute is upon abuse and neglect of disabled adults by persons and agencies responsible for their care. In this context, the phrase "caretaker" has been employed to encompass all relevant individuals, agencies or organizations providing care and services to the disabled adult. While the definition is broad in and of itself, expansion of coverage to include such situations as abuse of disabled adults in residential settings by other disabled residents, was considered administratively inappropriate and is clearly not intended.

Designating a state agency to be responsible for implementing the reporting, investigation and protective services provisions of the statute, as set forth in subdivision five, presents conceptual difficulties. Typically, the reference here should be to the state social services agency, called the department of public welfare, the department of health and welfare, the department of human resources, or the like. Furthermore, so as to avoid the problems inherent in any system of self-investigation, the statute should specify that the state agency responsible for administering the abuse reporting and

investigation system cannot be the agency that provides residential care and services to the disabled adult.

Ideally we would prefer to see the creation of a separate state agency to investigate abuse and neglect. Such an agency should be independent of any existing state department which operates, supervises or otherwise regulates the provision of residential care or services to disabled adults. However, this goal is difficult to attain, particularly in larger states, given existing variations in state organizational practices and the significant level of expenditures which would be required to establish an effective independent investigative body. Consequently, the model code is silent on this issue, although it is hoped that the states over time will strive to amend their laws to achieve this objective.

Also, the code does not prescribe a specific organizational pattern for the reporting and investigation of abuse and neglect or for the delivery of protective services. Again, variations in state administrative networks mitigate against any particular, uniform approach, and it also may be argued that legislating in this area may represent an unwarranted intrusion upon executive prerogatives. In any event, we would hope that whatever organizational system is established will facilitate, probably through the use of regional, county or other local offices, the objectives of expeditious investigation of abuse and neglect and the provision of protective services.

Further, with respect to the investigation of reports of abuse and neglect, subdivisions eight and fifteen define an

"indicated" report as one for which an investigation determines there is some credible evidence of the alleged abuse or neglect; similarly, "unfounded" reports are those which do not meet this test. Within this model statute, we have used this credible evidence standard rather than a higher, more exacting standard of judicial proof (i.e., clear and convincing evidence or preponderance of the evidence). This is because the code is designed to trigger, as the result of investigation of suspected cases of abuse or neglect, the provision of protective services to disabled adults and does not, as described below, invoke penal sanctions against an individual (which would require a higher standard of proof).

Finally, subdivision eleven contains a broadly constructed definition of protective services, embracing a wide range of enumerated services to protect disabled adults from abuse and neglect.

(2) Reporters and Reports

The model code requires all persons coming into contact with the disabled adult to report suspected cases of abuse and neglect. In addition, to facilitate reporting and accountability, the model code includes a non-exclusive listing of reporters such as medical and health officials; social services, mental health and other professionals; law enforcement officials; and the like. It also provides for anonymous reporting so as to encourage reports that might otherwise not be made. Anonymous reporting was found to be a valuable source of indicated reports by Barry University's study of abuse and neglect reports in Florida.² The

contents of abuse and neglect reports are set forth in detail and provision is also made for the taking of photographs, as well as x-rays by medical and other health service professionals, as appropriate. The code requires a reporter who suspects a disabled adult has died as a result of abuse or neglect to notify the appropriate medical examiner who, in turn, must report his findings to the police, the appropriate state or district attorney, and other officials. Persons reporting in good faith are granted immunity from civil or criminal liability which may result by reason of their actions, as are persons providing protective services or otherwise cooperating under the provisions of the act. Requirements to report under the act should be expected to generally supercede privileged communication requirements extant in state law and professional practice.

(3) Whistleblower Protections

The model code incorporates detailed provisions found in a number of state laws prohibiting retaliatory action on the part of an employer against any employee filing a report under the act. It provides that reporters will have a civil cause of action for appropriate damages against any person engaging in enumerated retaliatory practices and establishes a rebuttable presumption that any such detrimental changes in a person's employment status, if made within 90 days of the filing of a report, are retaliatory.

(4) Penalties for Failure to Report; No Penalties for Abuse/Neglect

The act provides that persons failing to report suspected

cases of abuse or neglect of disabled adults will be guilty of a misdemeanor. It does not contain sanctions against persons committing acts of abuse or neglect. We wish to emphasize that the model code set forth in this report is intended as a non-punitive statute and has as its focus the reporting and investigation of abuse and neglect and the delivery of protective services to disabled adults in appropriate cases. In this context, to include appropriate judicial standards of proof commensurate with penal law sanctions, as well as the criminal sanctions themselves, would be at direct odds with our intended focus.

Furthermore, when sanctions against abuse or neglect need to be invoked, state penal statutes can and should be utilized. They generally embrace acts of abuse or neglect under such terms as assault, battery, endangerment, rape and the like. Where state penal codes are not sufficient, particularly with respect to "lesser" acts of abuse or neglect (i.e., slaps and pinches rather than aggravated assault; failure to provide high quality care and services rather than the absence of specific care or services) state administrative systems designed to regulate the provision of care and services to disabled adults should ordinarily establish and enforce standards of practice through the use of such tools as supervision, technical assistance, training, discipline, transfer, and dismissal. When necessary, states should look to the improvement of both their penal statutes and administrative regulations in order to establish and enforce appropriate sanctions against abuse or neglect.

(5) Reporting and Investigating Procedures

The model code prescribes detailed time-limited reporting and investigation procedures including the immediate filing of oral reports and filing of written reports within forty-eight hours of oral reports. Further, investigations must commence within twenty-four hours of the receipt of the report. The investigation must include a comprehensive review of the cause, nature and extent of the suspected abuse or neglect; must provide for an interview with the disabled adult; and may, if determined necessary for the protection of the disabled adult, include medical, psychological, social, vocational and educational evaluation. Within ninety days of the receipt of a report an investigation must determine whether the report is "indicated" or "unfounded".

(6) State Central Register

The model statute provides for the establishment of a state central register of adult abuse and neglect capable of receiving reports of abuse and neglect, of identifying prior reports and of monitoring the provision of protective services to disabled adults twenty-four hours a day, seven days a week. States may wish to expand the scope of existing child abuse registers for this purpose. To effectuate these objectives, a single state-wide toll free telephone number is required for the register. Abuse/neglect reports and other information in the possession of the state department are treated as strictly confidential and are to be made available only to a specified list of persons as detailed in subdivision five of section twelve

of the act. In addition, provision is made for transmitting upon request, to a reporter, a summary of the findings of and action taken in response to a report. The act also provides for access to information contained in the register for purposes of pre-licensing and pre-employment screening of adult care agencies and workers.

The act further provides for the expungement from the state central register of all information identifying the subject of an abuse and neglect report unless an investigation determines that there is some credible evidence of abuse or neglect. In these cases (i.e., when reports are "indicated") the record of the report to the central register must be sealed no later than five years subsequent to the date of indication. (Even when records are sealed, aggregate non-identifying data would still be available for statistical and policy planning purposes.) The act also contains provisions whereby the subject of a report may request amendment, sealing or expungement of the record of the report as well as for fair hearings when the state agency does not comply with the person's request. Under the code, a person permitting or encouraging the release of confidential data contained in the state central register will be guilty of a misdemeanor.

(7) Taking a Disabled Adult into Protective Custody

Under provisions of the model statute, employees of the state agency, law enforcement officials, physicians or hospitals may take a disabled adult into protective custody or keep such person in their custody without the consent of the persons's

caretaker, if in their judgment the circumstances or conditions of the disabled adult present an imminent risk of death or of serious physical harm, and the disabled adult lacks the capacity to comprehend the nature and consequences of remaining in such a situation. In these cases, the state agency must be notified and must immediately initiate judicial proceedings provided for in the act for approval of short-term involuntary protective services.

(8) Provision of Protective Services; Judicial Proceedings for Short-Term Involuntary Services

The model embraces and codifies the principle that needed protective services are to be provided on a voluntary basis (i.e., the disabled adult requests such services and/or agrees to their provision). The model statute also establishes judicial procedures for the provision of short-term involuntary protective services when the state agency determines that protective services are needed but the disabled adult, who faces imminent risk of death or serious harm, lacks the capacity to understand this condition. However, (a) refusal of the disabled adult to accept protective services or (b) mental illness, will not in themselves be sufficient evidence of such lack of capacity.

Under the terms of the statute, such proceedings are to be commenced only by the state agency in courts of appropriate jurisdiction (to be determined by the state legislature). The petition to seek involuntary services must, among other things, state facts showing that the services requested are necessitated by the situation and condition of the disabled adult and

represent the least restrictive alternative available to protect the disabled adult (while still preserving his constitutional rights). Provisions are included for the appointment of counsel for the disabled adult as well as for a guardian ad litem in specific circumstances.

Proceedings for short-term involuntary protective services, which must have preference over all other issues in all courts, are to be commenced by service of an order to show cause returnable within forty-eight hours following its issuance. After a hearing at which the disabled adult is entitled to be present, in order to authorize the provision of short-term involuntary services, the court must find that all of the material allegations specified in the state agency's petition have been admitted or proven by clear and convincing proof. And, under the terms of the model code, no order may extend for more than seventy-two hours (with provision for only one seventy-two hour extension). Judicial orders may, among other things, provide for enjoining caretakers from interfering with the provision of protective services or with investigations of abuse and neglect; however, such orders may not order the removal of a disabled person to a mental hospital. Further, the code stipulates that issuance of a judgement for short-term involuntary protective services will not be evidence of the incompetency or incompetency of a disabled adult.

As may be inferred from the above recitation, the statutory scheme for involuntary protective orders presented here rests upon the assumption that only short-term interventions are constitutionally appropriate for adults, absent a finding of the

incompetency or other functional limitations of the adult. Indeed, the statute makes clear that longer term interventions may be sought but only upon the initiation of judicial proceedings under applicable provisions of state law relative to guardianship, conservatorship or incompetency, or for emergency admissions to mental hospitals. Such proceedings are not precluded from commencing simultaneously with proceedings for short-term involuntary protective services. Similarly, any such pending incompetency, guardianship, or conservator proceedings would not preclude the commencement of proceedings for short-term involuntary protective services.

(9) Education and Training; Cooperation of Other Agencies

In its concluding sections, the model statute requires the state agency to conduct a continuing education and publicity campaign, including specifically the training of employees in residential facilities, to encourage the fullest degree of reporting under the act. Further, to effectuate the purposes of the act, the state agency is authorized to request and receive cooperation, assistance and data from all state and local public and private agencies. Finally, agencies and facilities providing care and services to disabled adults must inform such persons of their rights to report cases of abuse or neglect and establish appropriate policies and procedures to facilitate such reporting.

(10) Oversight Responsibilities

Although no specific references are found in the code, states are encouraged to require notification of abuse/neglect

reports to such advocacy agencies as: (1) protection and advocacy agencies for developmentally disabled persons created pursuant to federal law, (2) aging ombudsman agencies also created pursuant to federal law or (3) other human rights advocacy committees or agencies which may exist or which are hereafter created by state legislatures. It is our belief that by including such notification, protection of disabled adults can be materially strengthened.

References Chapter V.

1. a. See References for Chapter II, p. 36.
 - b. Anne Lindeman, "Child Abuse Legislation", in Child Abuse and Neglect: Issues on Innovation and Implementation, Proceedings of the Second National Conference on Child Abuse and Neglect. DHEW Publication No. 78-30147. Washington, DC: U.S. Government Printing Office, 1978, pp. 340-343.
 - c. Harvey Abrams, Shirley Miller, Fred Krause, Site Visit Report, Florida, June 1980. Washington, D.C.: President's Committee on Mental Retardation, 1981.
2. Abuse and Neglect Reporting in Florida Residential Facilities for Developmentally Disabled Persons: 1974-1982. Miami, Florida: Barry University, School of Social Work, NCCAN/ADD Grant No. 90DJ0003, 1983.

B. Model State Code

- Section 1. Title
- Section 2. Legislative Findings and Purpose
- Section 3. Definitions
- Section 4. Persons and Officials Required to Report Cases of Suspected Abuse or Neglect of Disabled Adults
- Section 5. Reporting Procedure; Contents of Report
- Section 6. Obligation of Reporters
- Section 7. Mandatory Reporting to and Post-Mortem Investigation of Deaths by Medical Examiner or Coroner
- Section 8. Immunity from Liability
- Section 9. Retaliatory Action by Employer Prohibited
- Section 10. Penalties for Failure to Report
- Section 11. Investigation: Content and Procedure
- Section 12. State Central Register of Adult Abuse and Neglect
- Section 13. Additional Access to Information Contained in the State Central Register: Pre-Licensing and Pre-Employment Screening
- Section 14. Taking a Disabled Adult into Protective Custody
- Section 15. Provision of Protective Services; Voluntary Basis
- Section 16. Short-Term Involuntary Protective Services
- Section 17. Education and Training
- Section 18. Cooperation of Other Agencies

Section 1. Title

This act shall be known and may be cited as the Adult Abuse and Neglect Reporting Act of 198_

Section 2. Legislative Findings and Purpose

The legislature finds that disabled adults are in need of public protection to prevent them from suffering abuse and neglect at the hands of those responsible for their care, whether such care is in the home, in community settings, or in residential institutions. It is the purpose of this act to encourage the expeditious reporting and investigation of suspected abuse and neglect of disabled adults and facilitate the provision of protective services in appropriate circumstances, while protecting the civil and constitutional rights of disabled adults.

Section 3. Definitions

When used in this act and unless the specific context indicates otherwise:

1. "Abuse" means the infliction of physical injury by a caretaker so as to adversely affect the physical or emotional condition of the disabled adult, or failing to stop the infliction of such injury, including the commission of a sex offense as defined in the state's penal statutes.

2. "Adversely affect the emotional condition" means injury to the intellectual or psychological capacity of the disabled adult as evidenced by an observable impairment in his ability to function within his normal range of performance and behavior.

3. "Adversely affect the physical condition" means, but shall not be limited to, causing death, permanent or temporary disfigurement, or impairment of any bodily organ or function.

4. "Caretaker" means a person, agency or organization, including an operator, employee or volunteer of such person, agency or organization, responsible for providing care and services to the disabled adult, as a result of family relationship, voluntary assumption of the responsibility, by contract or by operation of applicable provisions of state law.

5. "Department" means the state department of _____, which has primary responsibility for state efforts to facilitate the reporting and investigation of abuse and neglect of disabled adults and for the provision of protective services to disabled adults.

6. "Developmental disability" means a severe, chronic disability of a person which:

(a) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(b) is manifest before the age of twenty-two;

(c) is likely to continue indefinitely;

(d) results in substantial functional limitations in three or more of the following areas of major life activity:

(i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and

(e) reflects the person's need for a combination of special, inter-disciplinary or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

7. "Disabled adult" means a person eighteen years of age and older who suffers from a condition of physical or mental incapacitation due to mental retardation, epilepsy, cerebral palsy, autism, organic brain damage caused by advanced age or other physical degeneration in connection therewith, or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances, or due to other disabilities, including a developmental disability.

8. "Indicated report" means a report made pursuant to this act if an investigation determines that some credible evidence of the alleged abuse or neglect exists.

9. "Neglect" means the failure of a caretaker to provide the care and services necessary to maintain the physical and mental health of the disabled adult including but not limited to: food; clothing; shelter; medical, dental, optometric, psychiatric, or surgical care; and special care, treatment and supervision made necessary by reason of disability.

10. "Petitioner" means an official of the department initiating a proceeding pursuant to section 16 of this act.

11. "Protective services" mean those services the objective of which is to protect disabled adults from abuse and neglect. Such protective services shall include, but are not limited to: (a) evaluation of the need for protective services; (b) social casework for the purposes of planning and providing needed services; (c) maintenance of the disabled adult in his own home through the provision of home health care, homemaker services,

day care and chore services; (d) assistance in obtaining out-of-home services, including respite care, emergency housing and placement in residential settings, as necessary; (e) obtaining financial benefits to which the disabled adult is entitled; (f) assistance in obtaining medical assistance and legal services; (g) seeking the appointment of a guardian or conservator or initiating incompetency proceedings; (h) securing transportation to and from service providers; and (i) other protective services for adults which are consistent with the provisions of this act and included in the state's comprehensive annual social services plan, as required by Title XX of the federal Social Security Act.

12. "Respondent" means the disabled adult on whose behalf a petition is initiated pursuant to section 16 of this act.

13. "State central register" means the state central register of adult abuse and neglect established in the department pursuant to section 12 of this act.

14. "Subject of the report" means any disabled adult reported to the state central register and the person suspected of committing acts of abuse or neglect also named in the report.

15. "Unfounded report" means any report made pursuant to this act unless an investigation determines that some credible evidence of the alleged abuse or neglect exists.

Section 4. Persons and Officials Required to Report Cases of Suspected Abuse or Neglect of Disabled Adults

All persons coming into contact with the disabled adult, when they have reasonable cause to believe that the disabled adult has been subject to abuse or neglect, shall report or cause a report to be made in accordance with this section. This includes but is not limited to: physicians; surgeons; medical examiners; coroners; dentists; osteopaths; optometrists; chiropractors; podiatrists; medical residents; interns; psychologists; other mental health professionals; registered nurses; hospital personnel engaged in admission, examination, care or treatment of persons; Christian Science practitioners; school officials; social services workers; day care center workers; caretakers; police officers; and law enforcement officials. Whenever a person makes a report under this section in his capacity as a member of the staff of a medical or other public or private institution, school, facility, or agency, and does not wish to remain anonymous, he shall immediately notify the person in charge of such institution, school, facility, or agency or his designated agent, who then shall become responsible to report or cause reports to be made. However, nothing in this section is intended to require more than one report from any such facility, institution, school or agency.

Section 5. Reporting Procedure; Contents of Report

Reports of suspected abuse or neglect of disabled adults made pursuant to this act shall be made immediately by telephone and in writing within forty-eight hours after such oral report. Oral reports shall be made to the state central register and written reports shall be made to the department in a manner prescribed by the department. Reports shall include as much of the following information as possible: name and address of the disabled adult and his caretaker, if known; the disabled adult's age, sex and race; the nature and extent of abuse or neglect of the disabled adult including any evidence of prior abuse or neglect; the name and address of the person responsible for committing suspected acts of abuse or neglect, if known; family composition; the source of the report; the person making the report and where he can be reached, if not wishing to remain anonymous; the actions taken by the reporting source, including the taking of photographs and x-rays, removal or keeping of the disabled adult, or notifying the medical examiner or coroner; and any other information which the department may by regulation require, or the person making the report believes may be helpful in the furtherance of the purposes of this act. Written reports from persons reporting under this act, other than those who report anonymously, shall be admissible as evidence in any proceedings relating to abuse or neglect of a disabled adult.

Section 6. Obligation of Reporters

Persons reporting cases of suspected abuse or neglect of disabled adults may take or cause to be taken at public expense, photographs of the areas of trauma visible on a disabled adult who is subject to a report and, if medically indicated, medical and other health services personnel specified in section 4 may cause a radiological examination to be performed on the disabled adult. Any photographs or x-rays taken shall be sent to the department at the time the written report is sent, or as soon thereafter as possible. Whenever a person makes a report under this act in his capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, and does not wish to remain anonymous, he shall immediately notify the person in charge of such institution, school, facility or agency, or his designated agent, who may then take or cause to be taken at public expense color photographs of visible trauma and may, if he is a medical or other health service professional specified in section 4 and if medically indicated, cause a radiological examination to be performed on the disabled adult.

Section 7. Mandatory Reporting to and Post-Mortem Investigation of Deaths by Medical Examiner or Coroner

Persons making reports of suspected abuse or neglect of disabled adults, who have reasonable cause to believe that a disabled adult died as a result of abuse or neglect shall notify the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the notification for investigation and shall report his findings to the police, the appropriate

state or district attorney, the department and if the institution making the report is a hospital, to the hospital.

Section 8. Immunity from Liability

Any person participating in good faith in the making of a report, the taking of photographs, the provision of protective services, or otherwise cooperating under the provisions of this act, shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions. For the purpose of any proceeding, civil or criminal, the good faith of any such person shall be presumed, providing that such liability did not result from the willful act or gross negligence of such person. Nothing contained in this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a disabled adult.

Section 9. Retaliatory Action By Employer Prohibited

No employer or supervisor may discharge, demote, transfer, reduce pay, benefits or work privileges, prepare a negative work performance evaluation or take any other action detrimental to any employee who files a report in accordance with the provisions of this act, by reason of such report. Any person making a report under this act shall have a civil cause of action for appropriate compensatory and punitive damages against any person who causes such detrimental changes in the employment status of the reporting party by reason of his making such report. There shall be a rebuttable presumption that any such detrimental change in the employment status of the reporter, if made within 90 days of the filing of a report under this act, is retaliatory.

Section 10. Penalties for Failure to Report

Persons required to report cases of suspected abuse or

neglect of disabled adults who knowingly and willfully fail to do so shall be guilty of a misdemeanor.

Section 11. Investigation: Content and Procedure

1. (a) Upon receipt of a report of suspected abuse or neglect of a disabled adult, the department shall commence, or cause to be commenced within twenty-four hours, an appropriate investigation of the report and the facts alleged therein, which investigation shall include: a determination of the nature, extent and cause of the suspected abuse or neglect; examination of evidence; identification, if possible, of the person alleged to be responsible for such abuse or neglect; the names and conditions of other adults in the place of residence; evaluation of caretakers, as appropriate; the environment of the residence of the disabled adult; the relationship of the disabled adult to the caretaker; an evaluation as to whether or not the disabled adult would consent to the provision of protective services; determination of the risk to such disabled adult if he continues to remain in the existing place of residence; and any other relevant information. After seeing to the safety of the disabled adult as provided in section 14, the department shall forthwith notify the subjects of the report in writing of the existence of the report and their rights pursuant to this act in regard to amendment or expungement.

(b) The investigation shall include an interview with the disabled adult which shall be conducted by a personal visit with the adult in the adult's place of residence, in an office of the department, or by any other means available to the depart-

ment.

(c) If the department determines a need exists in order to protect the disabled adult, the investigation may include a medical, psychological, social, vocational and educational evaluation and review of the circumstances, conditions and needs of the disabled adult.

2. The department shall determine within ninety days after receipt of the report, whether the report is "indicated" or "unfounded".

3. Based on such investigation and evaluation the department shall determine the need for and arrange for the provision of appropriate protective services, and monitor and evaluate the provision of such services.

Section 12. State Central Register of Adult Abuse and Neglect

1. There shall be established in the department a statewide central register of adult abuse and neglect reports made pursuant to this act.

2. The state central register shall be capable of receiving oral, electronic and written reports of abuse or neglect of disabled adults, of immediately identifying prior reports of disabled adult abuse or neglect involving the subject(s) of the report, and of monitoring the provision of protective services to disabled adults twenty-four hours a day, seven days a week. To effectuate this purpose, there shall be established a single statewide toll free telephone number that all persons may use to report cases of suspected abuse or neglect of disabled adults. Such oral reports shall be immediately transmitted orally or electronically by the state central register to the appropriate state or local office designated by the department to investigate suspected cases of abuse or neglect of disabled adults. If the records indicate a previous report concerning a subject of the report or other pertinent information, the appropriate state or local office shall be immediately notified of the fact.

3. The state central register shall include but not be limited to the following information: all the information in the written report; a record of the final disposition of the report, including protective services offered and provided, whether voluntarily or on an involuntary basis, pursuant to sections 15 and 16; plans for the provision of protective services; the names and identifying data, dates, and circumstances of any person

requesting or receiving information from the register; and any other information which the department believes may be helpful in the furtherance of the purposes of this act.

4. The state central register shall be operated in such a manner as to enable the department to: (a) monitor and evaluate the reporting and investigation of suspected abuse or neglect of disabled adults and the provision of protective services to such persons and to report thereon; (b) maintain and produce aggregate statistics for monitoring patterns of abuse or neglect of disabled adults; and (c) serve as a resource for the evaluation, management and planning of preventive and remedial services for disabled adults who have been subject to abuse or neglect.

5. Reports made pursuant to this act as well as any other information obtained, reports written, or photographs and x-rays taken concerning such reports, in the possession of the department or any state or local office designated by it to investigate suspected cases of abuse or neglect of disabled adults, shall be confidential and shall only be made available to: (a) a person authorized by section 14 to take the disabled adult into protective custody when such person has before him a disabled adult whom he reasonably suspects may be abused or neglected and such person requires the information in the record to determine whether to take the disabled adult into protective custody; (b) any person who is the subject of a report; (c) a court, upon finding that the information in the record is necessary for the determination of an issue before the court; (d) a grand jury, upon finding that the information in the record is

necessary for the determination of charges before the grand jury; (e) any person engaged in a bona fide research purpose provided, however, that no information identifying the subject of the report shall be made available to the researcher unless it is absolutely necessary to the research purpose and the department gives prior approval and suitable arrangements have been made to maintain the confidentiality of such data; (f) employees or agents of the department responsible for investigating reports of suspected abuse or neglect of disabled adults; and (g) appropriate officials of the department responsible for administration or supervision of the department's program for reporting and investigation of suspected abuse or neglect of disabled adults and for the provision of protective services, when carrying out their official duties. In addition, persons making reports shall receive, upon request, a summary of the findings of and action taken in response to the report, pursuant to the regulations of the department. A person given access to the names or other information identifying the subject of the report, except the subject of the report, shall not divulge or make public such identifying information unless he is a district attorney or other law enforcement official and the purpose of such disclosure is to initiate court action.

6. Unless an investigation of a report conducted pursuant to this act determines that there is some credible evidence of the alleged abuse or neglect, all information identifying the subject of the report shall be expunged from the state central register and from the records of any office or agency of the department designated to investigate suspected abuse or neglect

of disabled adults, forthwith.

7. In all other cases, the record of the report to the state central register shall be sealed no later than five years subsequent to the date the report is indicated. Once sealed, a record shall not otherwise be available unless the department, upon notice to the subject of the report, gives its approval for an appropriate reason. In any case and at any time, the department may amend, seal or expunge any record upon good cause shown and notice to the subject of the report.

8. At any time, a subject of a report may receive, upon request, a copy of all information contained in the state central register; provided, however, that the department shall not release data that would identify the person who made the report or who cooperated in a subsequent investigation, which it reasonably finds will be detrimental to the safety or interests of such person, without the written consent of such person.

9. Within thirty days time subsequent to the completion of the investigation, a subject of a report may request the department to amend, seal or expunge the record of the report. If the department refuses or does not act within a reasonable time, but in no event later than thirty days after such request, the subject shall have the right to a fair hearing to determine whether the record of the report in the state central register should be amended or expunged on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this act. The burden of proof in such hearing shall be on the department. In such hearing, the fact that there was an

indicated report of abuse or neglect shall be presumptive evidence that the report was substantiated. The department may make any appropriate order respecting the amendment or expungement of the record to make it accurate or consistent with the requirements of this act.

10. Written notice of any expungement or amendment of any record made pursuant to the provisions of this act, shall be served upon each subject of such record.

11. Any person who willfully permits and any person who encourages the release of any data and information contained in the state central register to persons or agencies not permitted by this act shall be guilty of a misdemeanor.

Section 13. Additional Access to Information Contained in
the State Central Register: Pre-Licensing and
Pre-Employment Screening

1. (a) A public or private agency which has received an application for a certificate or license to receive, board or keep a disabled adult pursuant to applicable provisions of state law, shall inquire of the department and the department shall inform such agency, whether the applicant has been or is currently the subject of an indicated report on file with the state central register pursuant to this act.

(b) A public or private agency receiving, boarding, or keeping disabled adults shall inquire of the department and the department shall inform such agency, whether any person who is actively being considered for employment with adult care responsibilities has been or is currently the subject of an indicated report on file with the state central register pursuant to this act.

(c) Any person who has applied for a certificate or license, to receive, board or keep a disabled adult or who has applied to a public or private agency to be an employee with adult care responsibilities shall be notified by such agency at the time of application that the agency will inquire of the department whether such person has been or is the subject of an indicated report of abuse or neglect. The agency shall notify the applicant of the department's response.

(d) The department shall inform the agency that the person has been or currently is the subject of an indicated report of abuse or neglect only if: (i) the time for the subject of the report to request a fair hearing pursuant to subdivision 9

of section 12 of this act has expired without any such request having been made; or (ii) such request was made within such time and the fair hearing has been finally determined by the department and the record of the report has not been amended, sealed or expunged.

2. (a) Upon notification by the department that any person who has applied for a license or certificate to receive, board or keep a disabled adult is the subject of an indicated report of abuse or neglect, such agency shall determine on the basis of information it has available whether to approve such application; provided, however that if such application is approved such agency shall maintain a written record as part of the application file of the specific reasons why such person was determined to be appropriate to receive the placement of a disabled adult.

(b) Upon denial of such application by a public or private agency, such agency shall furnish the applicant with a written statement setting forth its reasons for the denial.

(c) If the reasons for such denial include the fact that the person is the subject of an indicated report of abuse or neglect, such person may request from the department, and shall be granted, a fair hearing in accordance with applicable provisions of state law.

(d) At any such hearing, the sole question before the department shall be whether the applicant has been shown by a fair preponderance of the evidence to have committed the act or acts of abuse or neglect giving rise to the indicated report and if so, whether such person has been rehabilitated so that the

health, safety and welfare of a disabled adult will not be endangered if such person's application for a license or certificate is approved. In such hearing, the burden of proof on the issue of the rehabilitation of the applicant shall be upon the applicant.

Section 14. Taking A Disabled Adult into Protective Custody

The department acting through designated employees, a police officer, or a law enforcement official, may take a disabled adult into emergency protective custody, or any such person or any person in charge of a hospital or similar institution or any physician treating a disabled adult may keep such person in his custody without the consent of such person's caretaker, whether or not medical treatment is required, if the circumstances or condition of the disabled adult are such that continuing in the care of such person's caretaker presents an imminent risk of death or of serious physical harm and such adult lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents such imminent danger to his health or safety. In such cases, the department shall be notified forthwith of the taking of such disabled adult into emergency protective custody and the department shall immediately initiate a judicial proceeding pursuant to section 16 of this act.

Section 15. Provision of Protective Services; Voluntary Basis

The department shall provide or arrange for the provision of protective services through the purchase of services from appropriate public and private agencies, to a disabled adult found to have been subject to abuse or neglect, when the

department has determined that based upon its investigation and evaluation pursuant to section 11, (1) the disabled adult requires such services; (2) the disabled adult has requested such services; and/or (3) when any interested party has requested the provision of such services on behalf of the disabled adult, and the disabled adult consents to their provision. Such services shall be discontinued upon the request of the disabled adult.

Section 16. Short-Term Involuntary Protective Services

1. In the event that the department determines that (a) the disabled adult is in need of protective services; (b) such person is in a situation or condition which poses an imminent risk of death or of serious physical harm; and (c) such person lacks the capacity to understand the nature and consequences of remaining in such situation or condition; the department shall initiate proceedings pursuant to this section in courts of appropriate jurisdiction for the short-term provision of involuntary protective services; provided, however, that (i) refusal of the disabled adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity; and (ii) mental illness shall not in itself be sufficient evidence of such lack of capacity.

2. Jurisdiction and Venue

A petition for the provision of short-term involuntary protective services shall be made to a court of appropriate jurisdiction held in the county in which the disabled adult resides or is found or in a county adjacent to the county in which the disabled adult resides or is found.

3. Petition

(a) a special proceeding to obtain an order authorizing the provision of short-term involuntary protective services may only be initiated by the department.

(b) The petition shall state, insofar as the facts can be ascertained with reasonable diligence: (i) the name, age and physical description of the disabled adult; and (ii) the address or other location where the disabled adult can be found.

(c) The petition shall state facts showing: (i) that the disabled adult who is the subject of this petition meets the conditions set forth in subdivision 1 of this section; (ii) the specific short-term involuntary protective services petitioned for, how such services would remedy the situation or condition which poses an imminent risk of death or of serious physical harm to the disabled adult, and that such services with respect to extent or duration are the least restrictive alternative required to protect the disabled adult; (iii) that the short-term involuntary protective services being applied for are necessitated by the situation or condition described in subdivision 1 of this section; (iv) that the relief sought reflects, insofar as is possible, a comprehensive evaluation of the condition and service needs of the disabled adult; (v) that other voluntary protective services have been tried and have failed to remedy the situation and that a future, voluntary, less restrictive alternative would not be appropriate or would not be available; (vi) if a change in the disabled adult's physical location is being applied for, that remedy of the dangerous situation or condition described in subdivision 1 of this section is not appropriate in the existing physical surroundings of the disabled adult; (vii) any inconsistency known to the petitioner between the proposed short-term involuntary protective services and the disabled adult's religious beliefs; (viii) that, if it reasonably appears that the disabled adult does not understand the English language, that reasonable efforts have been made to communicate with the disabled adult in a language he

understands; (ix) that no prior application has been made for the relief requested or for any similar relief, or if prior application has been made, the determination thereof, and the new facts, if any, that were not previously shown which warrant a renewal of the application.

(d) The petition shall be verified. Any allegations which are not based upon personal knowledge shall be supported by affidavits provided by a person or persons having such knowledge. Such affidavits shall be attached to the petition.

4. Commencement of proceedings

(a) A special proceeding to obtain an order authorizing the provision of short-term involuntary protective services shall be commenced by service of an order to show cause, the petition and supporting affidavits, if any.

(b) The order to show cause shall set forth: (i) the protective services to be provided if the petition is granted; (ii) the date, place, and time of the hearing to determine whether the petition is to be granted; (iii) that the respondent is entitled to counsel at all stages of the proceedings, that upon granting the order to show cause, the court shall assign counsel, whose name, address and telephone number shall be included in the order, to assist the respondent, and that the respondent is free at any time to discharge the counsel assigned by the court; (iv) that if the respondent or retained counsel does not appear at the hearing to determine whether the petition is to be granted, the court will appoint a guardian ad litem; (v) that if the respondent discharges that assigned counsel prior to the hearing to determine if the petition is to

be granted, such counsel shall report this fact to the court no later than the commencement of the hearing and shall appear at the hearing unless otherwise relieved by the court; and (vi) that a copy of the order to show cause, the petition, and supporting affidavits, if any, shall be served upon the respondent.

(c) Petitioner shall cause the order to show cause, the petition, and supporting affidavits if any, to be delivered to the counsel assigned by the court.

(d) The order to show cause shall be made returnable within forty-eight hours following its issuance unless such forty-eight hour period ends on a day in which the court is not in session, in which case the return date shall be the first business day following issuance of the order to show cause.

5. Service

(a) Service of the order to show cause, the petition, and supporting affidavits, if any, shall be made upon the respondent by any of the methods permitted by applicable provisions of the state's civil practice law and rules. Notwithstanding any other provision of law to the contrary, Saturday and Sunday service is valid.

(b) The respondent shall be authorized to answer either orally or in writing.

6. Hearing

(a) Upon the return date designated in the order to show cause issued pursuant to subdivision 4 of this section, a hearing shall be held forthwith.

(b) The disabled adult shall be entitled to be present

at the hearing.

(c) Adjournments shall be permitted only for good cause shown. In granting adjournments the court shall consider the need to provide short-term involuntary protective services expeditiously.

(d) At the conclusion of the hearing, the court shall issue for the record a statement of its findings of fact and conclusions of law.

7. Preference

The special proceedings authorized by this act shall have preference over all other causes in all courts of appropriate jurisdiction.

8. Findings

After a hearing, the court must find in order to authorize the provision of short-term involuntary protective services that all of the material allegations as specified in paragraph (c) of subdivision 3 of this section have been admitted or proven by clear and convincing proof.

9. Judgement

(a) The court, upon making the findings required by subdivision 8 herein, shall direct the entry of a judgement authorizing the provision of short-term involuntary protective services to the disabled adult.

(b) A judgement authorizing short-term involuntary protective services to be provided to a disabled adult: (i) shall prescribe those specific protective services, as defined in section 3 of this act, which are to be provided and what person or persons are authorized or ordered to provide them; and

(ii) shall not provide for any forcible entry, unless the persons so entering are accompanied by a police officer or other duly authorized law enforcement official; and (iii) shall require persons acting under subparagraphs (i) and (ii) of this paragraph to submit a written report to the court within one week following the commencement of the ordered protective services.

(c) The judgement may order any other public or law enforcement official to render such assistance and cooperation as shall be within his legal authority, including action to enjoin a caretaker from interfering with the investigation of alleged acts of abuse and neglect pursuant to this act, or provision of protective services ordered by this section, as may be required to further the objectives of this act.

(d) The judgement shall not order the removal of a disabled adult to a mental hospital.

(e) Issuance of the judgement shall not be evidence of the competency or incompetency of the disabled adult.

(f) No order issued pursuant to this section shall extend for more than seventy-two hours. An original order may be renewed once for up to another seventy-two hour period upon showing by the petitioner to the court that continuation is necessary to remedy the original situation or condition. No further renewals shall be permitted.

(g) In no event shall the short-term involuntary services authorized to be provided to a disabled adult by the judgment be more extensive than those which are necessary to remedy the situation or condition which poses an imminent risk

of death or of serious physical harm to the disabled adult.

(h) Notice of the judgement rendered by the court shall be given to the respondent personally, or if personal service is not possible, in whatever other fashion the court shall prescribe.

10. Appeals

Appeals arising from the issuance of judgements pursuant to the provision of this section shall be expedited.

11. The assigned counsel and the guardian ad litem appointed by the court shall be reimbursed for their services pursuant to applicable provisions of state law.

12. Nothing in this section shall preclude the simultaneous commencement of incompetency, conservatorship or guardianship proceedings, or proceedings for emergency admission to mental hospitals under applicable provisions of state law. Any such pending proceedings shall not preclude commencement of a proceeding under this section.

13. No existing right or remedy of any character shall be lost, impaired or affected by reason of this section.

Section 17. Education and Training

The department, within appropriations available therefor, shall conduct a continuing publicity and education program including specifically the training of employees in residential facilities, to encourage the fullest degree of reporting of suspected abuse or neglect of disabled adults. The program shall include, but not be limited to, responsibility, obligations, and powers under this act as well as the identification and diagnosis

of abuse and neglect of disabled adults, and the procedures of the department and other duly authorized public and private agencies.

Section 18. Cooperation of Other Agencies

1. To effectuate the purposes of this act, the department may request and shall receive from departments, boards, bureaus or other agencies of the state, or any of its political subdivisions, including law enforcement agencies, or any duly authorized agency, or any other agency providing services to disabled adults such assistance, cooperation and data as will enable the department to fulfill its responsibilities.

2. All agencies, facilities, or institutions providing care and services to disabled adults shall inform such persons of their rights to report incidents of abuse or neglect, and shall establish appropriate policies and procedures to facilitate such reporting.

161-C: 25

PUBLIC SAFETY AND WELFARE

II. Any money realized by the division by proceedings under this chapter shall be distributed in accordance with the rules for distribution established by the division.

Source. 1977, 589:1. 1985, 331:19, eff. Amendments—1985. Designated the existing provisions of the section as par. I and added par. II.

161-C: 25 Unidentified Funds. All fees, costs, attorney fees, interest payments and funds received by the director, unidentifiable as to the support account against which they should be credited, shall be held in an administrative expense account from which the director may make disbursement for any expenses incurred in the administration of this chapter.

Source. 1977, 589:1, eff. July 1, 1977.

161-C: 26 Charging Off Uncollected Funds. Any support debt due the division from a responsible parent which the director deems uncollectible may be transferred from accounts receivable to a suspense account and cease to be accounted as an asset; provided, that at any time after 6 years from the date a support debt was incurred, the director may charge off as uncollectible any support debt upon which the director finds there is no available, practical, or lawful means by which said debt may be collected; provided further that no proceedings or action under the provisions of this chapter may be begun after expiration of said 6 year period to institute collection of a support debt. Nothing herein shall be construed to render invalid or nonactionable a support lien filed prior to the expiration of said 6 year period or an assignment of earnings or order to withhold and deliver executed prior to the expiration of said 6 year period.

Source. 1977, 589:1, eff. July 1, 1977.

161-C: 26-a Reporting to Credit Agencies.

I. Notwithstanding the provisions of RSA 359-C or any other law to the contrary, any obligor who owes child support arrearages payable to or through the division shall be deemed to have authorized disclosure of his financial records to consumer reporting agencies by the division.

II. Notwithstanding any other law to the contrary, any obligor who owes child support arrearage payable to or through the division shall be deemed to have authorized disclosure of his financial records to the division of human services by consumer reporting agencies.

III. The division shall give prior notice to the obligor that such financial disclosure is authorized and of the procedures through which he may contest the accuracy of the information to be disclosed.

IV. The division and any consumer reporting agency which discloses financial records under this section shall not be subject to civil liability or criminal prosecution which is based upon its disclosure under this section.

Source. 1985, 331:20, eff. Oct. 1, 1985.

CROSS REFERENCES

Disclosure of financial information or records by financial institutions and employers or obligors, see RSA 161-C: 3-a.

161-C: 27 Judicial Review. Any person who is aggrieved by any action of the director relative to the administrative process under this chapter may appeal to the superior court.

PROTECTIVE SERVICES TO ADULTS

161-D:

Source. 1977, 589:1. 1985, 331:21, eff. Amendments—1985. Amended section Oct. 1, 1985. generally.

161-C: 28 Rulemaking. The director is hereby authorized subject to RSA 541-A to adopt such rules not inconsistent with this chapter as may be necessary to the efficient administration of the functions with which he is charged under this chapter.

Source. 1977, 589:1. 1983, 242:4, eff. June 18, 1983. rules" and deleted "and regulations" thereafter.

Amendments—1983. Substituted "adopt" for "make and publish" preceding "such

161-C: 29 Separability of Provisions. If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.

Source. 1977, 589:1, eff. July 1, 1977.

CHAPTER 161-D

PROTECTIVE SERVICES TO ADULTS

161-D: 1 Purpose.
161-D: 2 Definitions.
161-D: 3 Reports of Adult Abuse; Investigations.
161-D: 3-a Immunity from Liability.
161-D: 3-b Abrogation of Privileged Communication.

161-D: 3-c Registry.
161-D: 3-d Penalty for Violation.
161-D: 4 Duties and Responsibilities.
161-D: 5 Guardianship.
161-D: 5-a Entry of Premises.
161-D: 5-b Court Ordered Examination.
161-D: 6 Rulemaking.

Implementation plan for creation of division of elderly and adult services—Generally. 1986, 128:4, eff. Sept. 1, 1986, provided in part: "All support services to all segments of the elderly and adult population of the state except income supplementation shall be consolidated in one administrative unit to the greatest extent possible. The commissioner of health and human services is, therefore, directed to consult with the director of the state council on aging and any other members of the director's staff or the commissioner's own staff or any other persons. The commissioner is then, after consulting with the members of the state council on aging, to prepare and submit an implementation plan creating a division of elderly and adult services by September 1, 1986. The plan shall be submitted to, and reviewed and approved by, a joint committee of the legislature consisting of the executive departments committee of the senate and the executive departments and administration committee of the house of representatives."

—Inclusion in plan of functions, powers, duties, etc., of division of human services relating to social services to the elderly and adults transferred to division of elderly and adult services. 1986, 128:12, eff. Jan 1, 1987, provided:

"I. The functions, powers, duties and responsibilities of the division of human services, under RSA 161:2, IV-a; RSA 161:2, XII; RSA 161:2, I; RSA 161:2, XII-a; RSA 161:9; and RSA 161-D which relate to social services for the elderly and adult populations, are hereby transferred to the division of elderly and adult services.

"II. The transfer provided for in paragraph I of this section shall include personnel, books, papers, records, equipment, unexpended appropriations or other funds, contracts, actions, and other property, resources or obligations of any kind of the division of human services. The transfer described in this section shall be included in the implementation plan under section 4 of this act (see 1986, 128:4, which is set out as a note above)."

161-D: 1 Purpose. The purpose of this chapter is to provide protection for incapacitated adults who are neglected, abused, and exploited. Implicit in this chapter is the philosophy that whenever possible family life should be strengthened and each adult should live in safe, sanitary conditions and live his own life without interruption from state government. Only when this principle should become impossible should legal proceedings be initiated in order to care for and protect such adults.

Source. 1977, 464: 1, eff. Sept. 10, 1977.

161-D: 2 Definitions. In this chapter:

I. "Adult" means any person who is 18 years of age or older who is found to manifest a degree of incapacity by reason of limited mental or physical function which may result in harm or hazard to himself or others or who is a person unable to manage his estate.

II. "Director" means the director of the division of human services, department of health and human services. [Amended 1983, 291: 1, I, II, eff. July 1, 1985.]

III. "Protective services" means services and action which will, through voluntary agreement or through appropriate court action, prevent neglect, abuse or exploitation of adults. Such services shall include, but not be limited to, supervision, guidance, counseling and, when necessary, assistance in the securing of sanitary and nonhazardous living accommodations, and mental and physical examinations. However, protective services shall not include voluntary commitment to the state hospital or the state school unless such commitments are made pursuant to RSA 195-B or RSA 171-A.

IV. "Abuse" means intentional use of physical force, non-accidental injury as the result of acts or omissions, mental anguish, or unreasonable confinement.

V. "Neglect" means a pattern of conduct rather than action or omission which results in deprivation of services that are necessary to maintain minimum mental and physical health.

VI. "Exploitation" means the illegal or improper use of an incapacitated adult or his resources for another's profit or advantage.

VII. "Serious bodily injury" means any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body. [Added 1983, 59: 1, eff. July 18, 1983.]

Source. 1977, 464: 1. 1983, 59: 1, eff. July 18, 1983; 291: 1, eff. July 1, 1985.

Amendments—1983, Paragraph II: Chapter 291 substituted "division of human services" for "division of welfare" and "department of health and human services" for "department of health and welfare". Paragraph VII: Added by ch. 59.

161-D: 3 Reports of Adult Abuse; Investigations. Any health care professional, hospital personnel, social worker, clergy, law enforcement official, protection officer, volunteer, or person residing in the home having reasonable cause to believe that any adult protected under the provisions of this chapter has been subjected to physical abuse, neglect or exploitation or is living in hazardous conditions shall report or cause a report to be made as follows: [Amended 1981, 367: 1, eff. Aug. 22, 1981.]

I. An oral report, by telephone or otherwise, shall be made immediately, followed by a written report, to the director or his authorized representative. When oral reports are made after working hours of the division of

human services, department of health and human services, or on weekends or holidays, such reports shall be made to the police department of the city, or to the sheriff of the county, in which the observation is made. Law enforcement officials receiving reports under this paragraph shall notify the director thereof within 72 hours of receipt of such reports. [Amended 1983, 291: 1, I, II, eff. July 1, 1985.]

II. Within 3 days following receipt by the director of such oral reports, an investigation shall be made by the director or his authorized representative and a written report shall be prepared which shall include the following:

(a) Name, age and address of such person being abused, neglected or exploited;

(b) Nature and extent of neglect, exploitation or injury suffered by such person;

(c) Any other facts or circumstances known to the reporter which may aid in the determination of appropriate action.

III. Investigations shall not be made if the director or his authorized representative determines that the report is frivolous or without a factual basis.

IV. [Repealed 1981, 367: 4, eff. Aug. 22, 1981.]

Source. 1977, 464: 1. 1979, 367: 1. 1981, 367: 1. 1983, 291: 1, I, II, eff. July 1, 1985.

Amendments—1979. Amended section generally.

—1981. Introductory paragraph: Substituted "Any health care professional, hospital personnel, social worker, clergy, law enforcement official, protection officer, volunteer, or person residing in the home" for "All physicians and other practitioners

of the healing arts"; and inserted "or is living in hazardous conditions" preceding "shall report or cause a report to be made as follows:".

Paragraph IV: Repealed. Former par. IV related to investigation of complaints.

—1983. Paragraph I: Substituted "division of human services, department of health and human services" for "division of welfare, department of health and welfare" in the second sentence.

161-D: 3-a Immunity from Liability. Any person or agency participating in good faith in the making of a report of an alleged incident of adult abuse shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any investigation by the director or his authorized representative or in any judicial proceeding resulting from such report.

Source. 1979, 367: 2. 1983, 41: 1, eff. June 20, 1983.

Amendments—1983. Substituted "any person or agency" for "anyone" preceding "participating" and "of an alleged incident of adult abuse" for "pursuant to RSA

161-D: 3" following "report" in the first sentence and inserted "in any investigation by the director or his authorized representative or" preceding "in any judicial proceeding" in the second sentence.

161-D: 3-b Abrogation of Privileged Communication. The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter.

Source. 1979, 367: 2. 1981, 367: 2, eff. Aug. 22, 1981.

Amendments—1981. Provided privileged communications not grounds for failure to report.

161-D: 3-c Registry. There shall be established a state registry of abuse reports, made pursuant to this chapter, at the division of welfare for the purpose of maintaining a record of information on each case of alleged abuse reported. The registry shall be confidential and subject to the rules and regulations as to access established by the director of the division of welfare, and any unfounded report shall be expunged from the registry and applicable section of case records within a period of 6 months.

Source. 1979, 357: 2, eff. Aug. 22, 1979.

161-D: 3-d Penalty for Violation. Any person who knowingly fails to make the report required by RSA 161-D: 3 shall be guilty of a misdemeanor.

Source. 1979, 357: 2. 1981, 367: 3, eff. Aug. 22, 1981.

Amendments—1981. Deleted reference to any physician or other practitioner of the healing arts; and provided "Any person who knowingly fails to make . . ."

161-D: 4 Duties and Responsibilities.

I. The director or his authorized representative, upon the substantiation of a complaint of neglect, abuse, exploitation of an adult or an adult living in hazardous conditions, shall provide, when necessary, protective services to such adults.

II. The director or his authorized representative shall refer all cases of serious bodily injury to an adult to the office of the attorney general or to the county attorney for possible criminal prosecution. The director or his authorized representative may also report other cases of abuse or cases of exploitation as he deems appropriate, under procedures to be developed jointly by the division of human services and the attorney general, to the office of the attorney general or to the office of the county attorney for possible criminal prosecution. [Amended 1983, 291: 1, II, eff. July 1, 1985.]

Source. 1977, 464: 1. 1983, 69: 2, eff. July 18, 1983; 291: 1, II, eff. July 1, 1985.

Amendments—1983. Chapter 69 designated the existing provisions of the section as par. I and added par. II. Chapter 291 substituted "division of human services" for "division of welfare" following "Jointly by the" in the second sentence of par. II.

161-D: 5 Guardianship. (If all other remedies are exhausted) the director or his authorized representative may seek to have a guardian or conservator appointed by the probate court, pursuant to RSA 464-A, for any adult who is in need of protective services. *USE RSA 464-A*

Source. 1977, 464: 1. 1986, 51: 1, eff. July 4, 1986.

Amendments—1986. Substituted "RSA 461-A" for "RSA 464".

161-D: 5-a Entry of Premises. If an adult reported or suspected of being abused, exploited, neglected or living in hazardous conditions refuses, or a caretaker refuses, to allow the representative of the division of human services, department of health and human services, entrance to the premises for the purpose of investigating an alleged complaint of neglect, abuse, exploitation or a hazardous living condition, the probate court, in the county where the adult is found, upon a finding of probable cause, may order a police officer, probation officer or social worker to enter said premises in furtherance of such investigation.

Source. 1979, 372: 1. 1983, 291: 1, I, II, eff. July 1, 1985.

Amendments—1983. Substituted "division of human services, department of

health and human services" for "division of welfare, department of health and welfare".

161-D: 5-b Court Ordered Examination. The probate court, at any time, may order a proposed ward to submit to a medical or psychiatric examination to be completed within 30 days by a certified psychologist, licensed psychiatrist or physician, or local community mental health center. A written report of such examination shall be forwarded to the court and shall contain, but not be limited to, the proposed ward's disease or disability, if any, his present mental status, and the prognosis. If the proposed ward objects to the evaluation, the probate court having jurisdiction shall be notified in writing within 5 days after notification of the time and place of such evaluation, and the court shall hold a hearing to consider the objection prior to ordering such evaluation or, upon good cause shown, may excuse the proposed ward from the provisions of this section.

Source. 1979, 372: 1, eff. Aug. 22, 1979.

161-D: 6 Rulemaking. The director shall adopt such rules under RSA 541-A as are necessary to carry out the purpose of this chapter, including, but not limited to, rules relative to access to records under RSA 161-D: 3-c.

Source. 1977, 464: 1. 1983, 242: 6, eff. June 18, 1983.

Amendments—1983. Amended section generally.

CHAPTER 161-E

PERSONAL CARE FOR THE SEVERELY PHYSICALLY DISABLED

161-E: 1 Definitions.

161-E: 3 Federal Funds.

161-E: 2 Services Provided.

161-E: 1 Definitions. In this chapter:

I. "Division" shall mean the division of human services, department of health and human services. [Amended 1983, 291: 1, eff. July 1, 1985.]

II. "Personal care attendant" shall mean a qualified non-family member who, in accordance with a plan of care prescribed by a physician and developed in conjunction with and reviewed by a registered nurse, assists severely physically disabled persons to maintain themselves in their homes and gain greater control over their own lives by providing medically oriented long-term maintenance and supportive care. This individual shall be approved by the division of vocational rehabilitation to provide such care.

III. "Severely physically disabled person" shall mean an individual who has been approved to participate in an independent living program of the division of vocational rehabilitation and who requires a minimum of 2 hours of medically oriented personal care per day in order to maintain himself or herself in a noninstitutional setting. Such care may include basic personal care and grooming, assistance with bladder and bowel care, assistance with medications, assistance with nutrition including meal preparation, essential household services, and medical transportation.

Source. 1979, 276: 1. 1983, 291: 1, eff. July 1, 1985.

Amendments—1983. Paragraph 1: Substituted "division of human services, de-

partment of health and human services" for "division of welfare, department of health and welfare".

PROTECTIVE LEGISLATION FOR THE
VULNERABLE AND HANDICAPPED

Introduction

Many of the most significant humanitarian achievements of modern civilization are due to advances in medical science. However, as scientific discoveries have prolonged life, they also have given rise to new ethical dilemmas which must be addressed in public policy.

This Section features three proposals designed to reflect humanitarian public policy toward the vulnerable and handicapped. The Section includes:

- (1) Vulnerable Adults Act, which addresses the issue of abuse and neglect of patients. This bill requires any person who knows or suspects that a patient has been abused or neglected to inform the appropriate health care officials. This legislation also fosters prompt investigation and fair disposition of such reports.
- (2) Basic Nursing Care Affirmation Act, which is designed to preserve traditional standards of medical care for all patients. This bill declares that patients are entitled to ordinary and basic care, including necessary food and water. This legislation also recognizes and preserves the traditional medical practice of allowing the removal of food and water from patients under certain conditions.
- (3) Assisted Suicide Prevention Act, which establishes that any person assisting in the suicide of another should be held legally accountable.

VULNERABLE ADULTS ACT

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. *[Short title.]* This Act may be cited as the Vulnerable Adults Act.

2
3 Section 2. *[Purpose.]* The legislature declares that the public policy of this
4 state is to protect adults who, because of physical or mental disability or
5 dependency on institutional services, are particularly vulnerable to abuse or
6 neglect; to provide safe institutional or residential services or living en-
7 vironments for vulnerable adults who have been abused or neglected; and to
8 assist persons charged with the care of vulnerable adults to provide safe en-
9 vironments.

10 In addition, it is the policy of this state to require the reporting of suspected
11 abuse or neglect of vulnerable adults, to provide for the voluntary reporting of

1 abuse or neglect of a vulnerable adult, to require the investigation of the
2 reports, and to provide protective and counseling services in appropriate cases.

3
4 Section 3. *[Definitions.]* As used in this Act:

5 (A) "Abuse" means:

- 6 (1) any act which constitutes a violation under *[cite appropriate*
7 *chapter relating to criminal conduct]*;
- 8 (2) nontherapeutic conduct which produces or could be expected to
9 produce severe/additional pain or injury and is not accidental, or
10 any repeated conduct which produces or could reasonably be ex-
11 pected to produce severe/additional mental or emotional distress;
- 12 (3) any sexual contact between a facility staff person and a resident or
13 client of that facility;
- 14 (4) the illegal use of a vulnerable adult's person or property for
15 another person's profit or advantage, or the breach of a fiduciary
16 relationship through the use of a person or a person's property for
17 any purpose not in the proper and lawful execution of a trust, in-
18 cluding, but not limited to, situations where a person obtains
19 money, property, or services from a vulnerable adult through the
20 use of undue influence, harassment, duress, deception, or fraud;
- 21 (5) counseling or ~~abetting~~ and abetting a suicide, or procuring any lethal
22 instrument or substance when a person knows or has reason to
23 know that a vulnerable adult intends to commit suicide.

24 (B) "Attending physician" means the physician with primary responsibility
25 for the care and treatment of a patient. If there is more than one physician car-
26 ing for the patient, these physicians, among themselves, shall designate the
27 "attending physician" for purposes of this Act.

28 (C) "Caretaker" means an individual or facility who has responsibility for
29 the care of a vulnerable adult as a result of family relationship, or who has
30 assumed responsibility for all or a portion of the care of a vulnerable adult
31 voluntarily, by contract, or by agreement.

32 (D) "Facility" means a hospital or other entity required to be licensed pur-
33 suant to *[cite appropriate chapter relating to hospitals and medical facilities]*, a
34 nursing home required to be licensed to serve adults pursuant to *[cite ap-
35 propriate chapter relating to nursing homes]*; an agency, day care facility, or
36 residential facility required to be licensed to serve adults pursuant to *[cite ap-
37 propriate chapter]*; or a home health agency certified for participation in Titles
38 XVIII or XIX of the Social Security Act, 42 USC 1395, *et seq*

39 (E) "Licensing agency" means:

- 40 (1) the *[designate appropriate commissioner of health]* for a facility
41 required to be licensed or certified by the *[designate appropriate*
42 *department of health]*.

1 (2) the [designate appropriate commissioner of human services] for a
2 facility required to be licensed or certified;

3 (3) any licensing board which regulates persons pursuant to [cite ap-
4 propriate chapter relating to administrative procedure]; and

5 (4) any agency responsible for credentialing human services occupa-
6 tions.

7 (F) "Life-resuscitating procedure" means any medical procedure or in-
8 tervention that uses any means to restore a vital function of a person.

9 (G) "Life-sustaining procedure" means any medical procedure or interven-
10 tion that uses mechanical or other artificial means to sustain, or supplant a
11 vital function of a person terminally ill and serves only to artificially prolong
12 the moment of death. "Life-sustaining procedure" does not include the usual
13 care provided to patients, which would include routine care necessary to sus-
14 tain patient comfort and the usual and typical provision of nutrition which in
15 the medical judgment of the attending physician such person can tolerate, and
16 subject to the provisions of Section 6 of this Act.

17 (H) "Local law enforcement officials" refers to local law enforcement
18 agents or other officials assigned to investigate a specific incidence of alleged
19 abuse.

20 (I) "Necessary food and water" means nutrition and hydration, irrespec-
21 tive of the manner of provision or assistance, sufficient to maintain the patient
22 at his highest possible level of health as determined by his attending physician
23 in accordance with ordinary and accepted standards of medical care, but does
24 not include nutrition and hydration, when, in the judgments of the patient's
25 attending physician and a second consulting physician:

26 (1) the administration of nutrition or hydration will unavoidably and
27 in itself cause severe, intractable or long-standing pain to the pa-
28 tient;

29 (2) the administration of nutrition or hydration is not medically feasi-
30 ble, in that

31 (a) the patient is unable to ingest nutrients or incorporate fluids,
32 or

33 (b) no technique or procedure is reasonably available to the atten-
34 ding physician for such administration; or

35 (3) the death of the patient from a terminal illness is imminent.

36 (J) "Neglect" means:

37 (1) failure by a caretaker to supply the vulnerable adult with necessary
38 food, water, clothing, shelter, health care, or supervision;

39 (2) the absence or likelihood of absence of necessary food, water,
40 clothing, shelter, health care, or supervision for a vulnerable
41 adult; or

42 (3) the absence or likelihood of absence of necessary financial

1 management to protect a vulnerable adult against abuse. Nothing
2 in this Section shall be construed to require a facility to provide
3 financial management or supervise financial management for a
4 vulnerable adult except as otherwise required by law.

5 (K) "Report" means any report received by local law enforcement officials,
6 welfare agency, or licensing agency, pursuant to this Act.

7 (L) "Terminally ill" means the incurable condition of a person caused by
8 injury, disease or illness which, regardless of the application of life-sustaining
9 procedures will, within reasonable medical judgment, produce death, and
10 where the application of life-resuscitating procedures serve only to postpone
11 the moment of death of the person.

12 (M) "Vulnerable adult" means any person 18 years of age or older:

13 (1) who is a resident or inpatient of a facility;

14 (2) who receives services from a facility, except a person receiving out-
15 patient services for treatment of chemical dependency or mental
16 illness;

17 (3) who, regardless of residence or type of service received, is unable
18 or unlikely to report abuse or neglect without assistance because
19 of impairment of mental or physical function or emotional status.

20

21 Section 4. [Persons mandated to report.]

22 (A) Those persons mandated to report an incident of alleged abuse will in-
23 clude persons who have knowledge of the abuse or neglect of a vulnerable
24 adult, have reasonable cause to believe that a vulnerable adult is being or has
25 been abused or neglected, or who have knowledge that a vulnerable adult has
26 sustained a physical injury which is not reasonably explained by the history of
27 injuries provided by the caretaker or caretakers of the vulnerable adult. Such
28 persons shall immediately report the information to the local law enforcement
29 officials. Upon receiving a report, the local law enforcement officials shall im-
30 mediately notify the state Department of Justice and the appropriate licensing
31 agency or agencies. The above specifically refers to:

32 (1) a professional or his delegate engaged in the care of vulnerable
33 adults, in education, in social services, law enforcement, or in any
34 of the regulated occupations referenced in Sections 3(1)(3) and
35 3(1)(4);

36 (2) an employee of a rehabilitation facility certified by the [designate
37 appropriate commissioner of vocational rehabilitation]; or

38 (3) an employee of or a person providing services in a facility;

39 (4) medical examiners or coroners, in instances in which they believe
40 that a vulnerable adult has died as a result of abuse or neglect

41 (B) Nothing in this section shall be construed to require the reporting or
42 transmittal of information regarding an incident of abuse or neglect or

1 suspected abuse or neglect if the incident previously has been reported or
2 transmitted to the appropriate person or entity.

3
4 Section 5. *[Report.]* All reports received by local law enforcement officials,
5 welfare agency or licensing agency shall immediately be transmitted to the
6 state governing agency. Each of the three above-mentioned authorities shall
7 develop and disseminate procedures to coordinate their investigatory ac-
8 tivities.

9 (A) A person required to report under Section 4 of this Act shall make an
10 oral report immediately by telephone or otherwise, and shall make a written
11 report as soon as possible thereafter to the local law enforcement officials or
12 licensing agency. The written report shall be of sufficient content to:

- 13 (1) identify the vulnerable adult, the caretaker, the nature and extent
14 of the suspected abuse or neglect;
- 15 (2) state any evidence of previous abuse or neglect;
- 16 (3) state the name and address of the reporter; and
- 17 (4) list of any other information that the reporter believes might be
18 helpful in investigating the suspected abuse or neglect.

19 (B) Written reports received by local law enforcement officials shall be for-
20 warded immediately to the local welfare agency. The local law enforcement of-
21 ficial may keep copies of any reports received. Copies of written reports
22 received by a local welfare agency shall be forwarded immediately to the local
23 law enforcement officials and the appropriate licensing agency or agencies.

24
25 Section 6. *[Report not required.]*

26 (A) Where federal law specifically prohibits a person from disclosing pa-
27 tient identifying information in connection with a report of suspected abuse or
28 neglect under this Act, that person need not make a required report unless the
29 vulnerable adult, or the vulnerable adult's guardian, conservator, or legal
30 representative, has consented to disclosure in a manner which conforms to
31 federal requirements. Facilities whose patients or residents are covered by such
32 a federal law shall seek consent of the disclosure of suspected abuse or neglect
33 from each patient or resident, or his guardian, conservator, or legal represen-
34 tative, upon his admission to the facility. Persons who are prohibited by
35 federal law from reporting an incident of suspected abuse or neglect shall
36 promptly seek consent to make a report.

37 (B) Except as provided in Section 3(A)(1), verbal or physical aggression oc-
38 curring between patients, residents, or clients of a facility, or self-abusive
39 behavior of these persons does not constitute "abuse" for the purposes of Sec-
40 tion 4 unless it causes serious harm. The operator of the facility or a designee
41 shall record incidents of aggression and self-abusive behavior in a manner that
42 facilitates periodic review by local law enforcement officials and licensing

1 agencies.

2 (C) Nothing in this Section shall be construed to require a report of abuse,
3 as defined in Section 3(A)(4), solely on the basis of the transfer of money or
4 property by gift or as compensation for services rendered.

5
6 Section 7. *[Immunity from liability.]*

7 (A) A person making a voluntary or mandated report under Section 4 or
8 participating in an investigation under this Act is immune from any civil or
9 criminal liability that otherwise might result from the person's actions, if the
10 person is acting in good faith.

11 (B) A person employed by a local law enforcement authority or licensing
12 agency who is conducting or supervising an investigation or enforcing the law
13 in compliance with Sections 12, 13, or 14 or any related rule or provision of
14 law is immune from any civil or criminal liability that might otherwise result
15 from the person's actions, if the person is acting in good faith and exercising
16 due care.

17
18 Section 8. *[Falsified reports.]* A person who intentionally makes a false
19 report under the provisions of this Act shall be liable in a civil suit for any ac-
20 tual damages suffered by the person or persons so reported.

21
22 Section 9. *[Failure to report.]*

23 (A) A person required by this Act to report, who intentionally fails to
24 report, is guilty of a misdemeanor.

25 (B) A person required to report by this Act who negligently or intentionally
26 fails to report is liable for damages caused by the failure.

27
28 Section 10. *[Evidence not privileged.]* No evidence regarding the abuse or
29 neglect of the vulnerable adult shall be excluded in any proceeding arising out
30 of the alleged abuse or neglect on the grounds of lack of competency under
31 *[cite appropriate evidentiary code section].*

32
33 Section 11. *[Duties of local law enforcement officials upon receipt of a
34 report.]* In carrying out these duties, the local law enforcement official shall
35 notify and seek the help of the local welfare agency.

36 (A) The local law enforcement officials shall immediately investigate and
37 offer emergency and continuing protective social services for purposes of
38 preventing further abuse or neglect and for safeguarding and enhancing the
39 welfare of the abused or neglected vulnerable adult. Local law enforcement of-
40 ficials may enter facilities and inspect and copy records as part of investiga-
41 tions. In cases of suspected sexual abuse, the local law enforcement official
42 shall immediately arrange for and make available to the victim appropriate

1 medical examination and treatment. The investigation shall not be limited to
2 the written records of the facility, but shall include every other available
3 source of information. When necessary in order to protect the vulnerable
4 adult from further harm, the local law enforcement officials shall seek
5 authority to remove the vulnerable adult from the situation in which the
6 neglect or abuse occurred. The local law enforcement officials shall also invest-
7 gate to determine whether the conditions which resulted in the reported
8 abuse or neglect place other vulnerable adults in jeopardy of being abused or
9 neglected and offer protective social services that are called for by its deter-
10 mination. In performing any of these duties, the local law enforcement offi-
11 cials shall maintain appropriate records.

12 (B) If the report indicates, or if the local law enforcement officials find,
13 that the suspected abuse or neglect occurred at a facility, or while the vulner-
14 able adult was or should have been under the care of or receiving services from
15 a facility, or that the suspected abuse or neglect involved a person licensed by a
16 licensing agency to provide care or services, the local welfare agency shall im-
17 mediately notify each appropriate licensing agency, and provide each licensing
18 agency with a copy of the report and its investigative findings.

19 (C) When necessary in order to protect a vulnerable adult from serious
20 harm, the local law enforcement official shall immediately intervene on behalf
21 of that adult to help the family, victim, or other interested person by seeking
22 any of the following:

- 23 (1) a restraining order or a court order for removal of the perpetrator
24 from the residence of the vulnerable adult pursuant to *[cite ap-*
25 *propriate rule of civil procedure]*;
- 26 (2) the appointment of a guardian or conservator, or guardianship or
27 conservatorship pursuant to *[cite appropriate chapter relating to*
28 *guardianship]*;
- 29 (3) replacement of an abusive or neglectful guardian or conservator
30 and appointment of a suitable person as guardian or conservator,
31 pursuant to *[cite appropriate chapter relating to guardianship]*; or
- 32 (4) a referral to the prosecuting attorney for possible criminal prose-
33 cution of the perpetrator under *[cite appropriate criminal pro-*
34 *cedure section]*.

35 (D) The expenses of legal intervention must be paid by the county in the
36 case of indigent persons, under *[cite appropriate section relating to indigency]*.

37 (E) In guardianship and conservatorship proceedings, if a suitable relative
38 or other person is not available to petition for guardianship or conservator-
39 ship, a county employee shall present the petition with representation by the
40 county attorney. The county attorney shall contract with or arrange for a
41 suitable person or nonprofit organization to provide ongoing guardianship
42 services. If the county presents evidence to the probate court that it has made a

1 diligent effort and no other suitable person can be found, a county employee
2 may serve as guardian or conservator. The county shall not retaliate against
3 the employee for any action taken on behalf of the ward or conservatee even if
4 the action is adverse to the county's interest. Any person retaliated against in
5 violation of this Section shall have a cause of action against the county and
6 shall be entitled to reasonable attorney fees and costs of the action if the action
7 is upheld by the court.
8

9 Section 12. *[Notification of neglect or abuse in a facility.]*

10 (A) When a report is received that alleges abuse or neglect of a vulnerable
11 adult while in the care of a facility required to be licensed under *[cite ap-*
12 *propriate chapter relating to nursing homes]*, or *[cite appropriate chapter*
13 *relating to day care or residential facilities]*, the local law enforcement officials
14 investigating the report shall notify the guardian or conservator of a
15 vulnerable adult under guardianship or conservatorship who is alleged to have
16 been abused or neglected. The local law enforcement officials shall notify the
17 person, if any, designated to be notified in case of an emergency regarding a
18 vulnerable adult not under guardianship or conservatorship who is alleged to
19 have been abused or neglected, unless consent is denied by the vulnerable
20 adult. The notice shall contain the following information:

- 21 (1) the name of the facility;
- 22 (2) the fact that a report of alleged abuse or neglect of a vulnerable
23 adult in the facility has been received;
- 24 (3) the nature of the alleged abuse or neglect;
- 25 (4) notice that the agency is conducting an investigation;
- 26 (5) any protective or corrective measures being taken pending the out-
27 come of the investigation; and
- 28 (6) notice that a written memorandum will be provided when the in-
29 vestigation is completed.

30 (B) In a case of alleged abuse or neglect of a vulnerable adult while in the
31 care of a facility required to be licensed under *[cite appropriate section relating*
32 *to day care or residential facilities]*, the local law enforcement officials may
33 also provide the information in subsection (A) to the guardian or conservator
34 of any other vulnerable adult in the facility who is under guardianship or con-
35 servatorship, and to the person, if any, designated to be notified in case of an
36 emergency regarding any other vulnerable adult in the facility who is not under
37 guardianship or conservatorship, unless consent is denied by the vulnerable
38 adult, if the investigative agency knows or has reason to believe the alleged
39 neglect or abuse has occurred.

40 (C) When the investigation under Section 12 is completed, the local welfare
41 agency shall provide a written memorandum to every guardian or conservator
42 or other person notified by the agency of the investigation under subsection

1 (A) or (B). The memorandum shall protect the identity of the reporter and the
2 alleged victim and shall not contain the name or, to the extent possible, reveal
3 the identity of the alleged perpetrator or of those interviewed during the in-
4 vestigation. The memorandum shall contain the following information:

- 5 (1) the name of the facility investigated;
- 6 (2) the nature of the alleged neglect or abuse;
- 7 (3) the investigator's name;
- 8 (4) a summary of the investigative findings;
- 9 (5) a statement of whether the report was found to be sustained, in-
10 conclusive, or false; and
- 11 (6) the protective or corrective measures that are being or will be
12 taken.

13 (D) In a case of neglect or abuse of a vulnerable adult while, in the care of a
14 facility required to be licensed under *[cite appropriate sections relating to day*
15 *care or residential facilities]*, the local law enforcement officials may also pro-
16 vide the written memorandum to the following individuals if the report is un-
17 substantiated or if the investigation is inconclusive and the report is a second
18 or a subsequent report of neglect or abuse of a vulnerable adult while in the
19 care of the facility:

- 20 (1) the guardian or conservator of any other vulnerable adult in the
21 facility who is under guardianship or conservatorship;
- 22 (2) any other vulnerable adult in the facility who is not under guar-
23 dianship or conservatorship; and
- 24 (3) the person, if any, designated to be notified in case of an emergen-
25 cy regarding any other vulnerable adult in the facility who is not
26 under guardianship or conservatorship, unless consent is denied
27 by the vulnerable adult.

28 (E) In determining whether to exercise the discretionary authority granted
29 under subsections (B) and (D), the local law enforcement officials shall con-
30 sider the seriousness and extent of the alleged abuse or neglect and the impact
31 of notification on the residents of the facility. The facility shall be notified
32 whenever this discretion is exercised.

33 (F) Where federal law specifically prohibits the disclosure of patient identi-
34 fying information, the local law enforcement officials shall not provide any
35 notice under subsection (A) or (B) or any memorandum under subsection (C)
36 or (D) unless the vulnerable adult has consented to disclosure in a manner
37 which conforms to federal requirements.

38
39 Section 13. *[Duties of licensing agencies upon receipt of report.]* A licensing
40 agency shall investigate immediately all reports or other information which in-
41 dicates that a vulnerable adult may have been abused or neglected at a facility
42 it has licensed, or that a person it has licensed or credentialed to provide health

1 care or services may be involved in the abuse or neglect of a vulnerable adult,
2 or that such a facility or person has failed to comply with the requirements of
3 this Act. Subject to the *[cite appropriate administrative procedure sections]*,
4 the licensing agency shall have the right to enter facilities and inspect and copy
5 records as part of its investigations. The investigation shall not be limited to
6 the written records of the facility, but shall include every other available
7 source of information. The licensing agency shall issue orders and take actions
8 designed to prevent further abuse or neglect of vulnerable adults. Such actions
9 may include the suspension or revocation of a person's license or the facility's
10 license.

11
12 Section 14. *[Records.]*

13 (A) Each licensing agency shall maintain summary records of reports of
14 alleged abuse or neglect and alleged violations of the requirements of this sec-
15 tion with respect to facilities or persons licensed or credentialed by that agen-
16 cy. As part of these records, the agency shall prepare an investigation
17 memorandum. The investigation memorandum shall be a public record and a
18 copy shall be provided to any public agency which referred the matter to the
19 licensing agency for investigation. It shall contain a complete review of the
20 agency's investigation, including, but not limited to:

- 21 (1) the name of the facility investigated;
- 22 (2) a statement of the nature of the alleged abuse or neglect or other
23 violation of the requirements of this Section;
- 24 (3) a statement of pertinent information obtained from medical or
25 other records reviewed;
- 26 (4) the investigator's name;
- 27 (5) a summary of the investigation's findings;
- 28 (6) a statement of whether the report was found to be substantiated,
29 inconclusive, or false; and
- 30 (7) a statement of any action taken by the agency.

31 The investigation memorandum shall protect the identity of the reporter and
32 of the vulnerable adult and may not contain the name or, to the extent possi-
33 ble, the identity of the alleged perpetrator or of those interviewed during the
34 investigation. During the licensing agency's investigation, all data collected
35 pursuant to this Act shall be classified as investigative data pursuant to *[cite*
36 *appropriate administrative code section]*. After the licensing agency's in-
37 vestigation is complete, the data on individuals collected and maintained shall
38 be private data on individuals. All data collected pursuant to this Section shall
39 be made available to prosecuting authorities and law enforcement officials,
40 local welfare agencies, and licensing agencies investigating the alleged abuse or
41 neglect. Notwithstanding any law to the contrary, the name of the reporter
42 shall be disclosed only upon a finding by the court that the report was false.

1 and made in bad faith.

2 (B) Notwithstanding any law to the contrary:

3 (1) all data maintained by licensing agencies, treatment facilities, or
4 other public agencies which relates to reports which, upon in-
5 vestigation, are found to be false may be destroyed two years after
6 the finding is made;

7 (2) all data maintained by licensing agencies, treatment facilities, or
8 other public agencies which relates to reports which, upon in-
9 vestigation, are found to be inconclusive may be destroyed four
10 years after the finding is made;

11 (3) all data maintained by licensing agencies, treatment facilities, or
12 other public agencies which relates to reports which, upon investi-
13 gation, are found to be substantiated may be destroyed seven
14 years after the finding is made.
15

16 Section 15. *[Abuse prevention plans.]*

17 (A) Each facility, except home health agencies, shall establish and enforce
18 an ongoing written abuse prevention plan. The plan shall contain an assess-
19 ment of the physical plant, its environment, and its population identifying fac-
20 tors which may encourage or permit abuse, and a statement of specific
21 measures to be taken to minimize the risk of abuse. The plan shall comply with
22 any rules governing the plan promulgated by the licensing agency.

23 (B) Each facility shall develop an individual abuse prevention plan for each
24 vulnerable adult residing or receiving services there. The plan shall contain an
25 individualized assessment of the person's susceptibility to abuse, and a state-
26 ment of the specific measures to be taken to minimize the risk of abuse to that
27 person. For the purpose of this clause, the term "abuse" includes self-abuse.
28

29 Section 16. *[Internal reporting of abuse and neglect.]* Each facility shall
30 establish and enforce an ongoing written procedure in compliance with the
31 licensing agencies' rules for insuring that all cases of suspected abuse or
32 neglect are reported and investigated promptly.
33

34 Section 17. *[Enforcement.]*

35 (A) A facility that has not complied with this Section within 60 days of the
36 effective date of passage of temporary rules is ineligible for renewal of its
37 license. A person who is required by Section 4 to report and who is licensed or
38 credentialed to practice an occupation by a licensing agency, who willfully
39 fails to comply with this Act shall be disciplined after a hearing by the ap-
40 propriate licensing agency.

41 (B) Licensing agencies shall as soon as possible promulgate rules necessary
42 to implement the requirements of Sections 14, 15, 16, 17, 18, and 19(A). Agen-

1 cies may promulgate temporary rules pursuant to *[cite appropriate ad-*
2 *ministrative procedure section]*.

3 (C) The *[cite appropriate commissioner of human services]* shall promul-
4 gate rules as necessary to implement the requirements of Section 12.
5

6 Section 18. *[Retaliation prohibited.]*

7 (A) A facility or person shall not retaliate against any person who reports in
8 good faith suspected abuse or neglect pursuant to this Act, or against a
9 vulnerable adult with respect to whom a report is made.

10 (B) Any facility or person which retaliates against any person because of a
11 report of suspected abuse or neglect is liable to that person for actual damages
12 and, in addition, a penalty of up to \$1,000.

13 (C) There shall be a rebuttable presumption that any adverse action, as
14 defined below, within 90 days of a report, is retaliatory. For purposes of this
15 clause, the term "adverse action" refers to action taken by a facility or person
16 involved in a report against the person making the report or the person with
17 respect to whom the report was made and includes, but is not limited to:

- 18 (1) discharge or transfer from the facility;
- 19 (2) discharge from or termination of employment;
- 20 (3) demotion or reduction in remuneration for services;
- 21 (4) restriction or prohibition of access to the facility or its residents;
22 or
- 23 (5) any restriction of rights set forth in *[cite appropriate section*
24 *enumerating employee rights]*.
- 25

26 Section 19. *[Outreach.]* The *[designate appropriate commissioner of*
27 *human services]* shall establish an aggressive program, using a variety of
28 media, to educate those required to report, as well as the general public, about
29 the requirements of this Act.
30

31 Section 20. *[Penalty.]* Any caretaker, operator, employee or volunteer
32 worker thereof, who intentionally abuses or neglects a vulnerable adult, or be-
33 ing a caretaker, knowingly permits conditions to exist which result in the abuse
34 or neglect of a vulnerable adult, is guilty of a *[specify misdemeanor]*
35

36 Section 21. *[Severability clause.]*

37 Section 22. *[Repealer clause.]*

38 Section 23. *[Effective date.]*
39
40

3 accused of mistreating mentally retarded patients

By C.L. GILBERT
and DON HUNTER
Daily News reporters

Prosecutors on Monday charged three former state employees with harassing, endangering or assaulting residents of a home for the mentally retarded in Valdez.

The 39 misdemeanor charges include allegations that one of the accused endangered two residents of Harborview Developmental Center by pushing them from their wheelchairs into a therapy pool and used masking tape to bind a resident's eyes, mouth and legs. The charges also include accusations of kicking residents and hitting

them with basketballs.

Harborview is a state-operated home for the mentally retarded. It employs about 130 workers who care for about 70 residents, many of whom also have extreme physical disabilities.

The three former employees charged are Steve Stone, 31, his brother, Jeffrey Stone, 25, and Artie R. Collins, 25. They were among four employees fired last October by Harborview Director Pat Londo.

The Stone brothers and Collins denied mistreating residents and have appealed

See Back Page, THREE

Daily News
6-11-85

Three charged with mistreating residents at state home

Continued from Page A-1

their dismissals. An arbitrator is expected to rule on their request for reinstatement next month.

None of the three could be reached for comment Monday. Steve Stone was said to be out on a fishing boat.

The charges, filed in Valdez, are based on a Valdez police officer's interviews with other Harborview employees and with college interns who worked at the institution in 1983 and 1984.

The fourth employee fired was not mentioned in the charges.

Monday, Londo said the four were fired because "we felt they were causing some discomfiture for residents. We did not use the word 'abuse' (then) because we did not feel we could say there was abuse," he said.

Londo refused to discuss the charges further because the arbitration is not concluded. A state labor negotiator familiar with the case, Bruce Cummings, said some of the charges may involve informa-

tion that was not available to Harborview officials at the time of the dismissals.

Robert Watts, field office manager for the Alaska Public Employees Association, said he was surprised by the charges. He said he suspects the filing may be the result of pressure brought to bear on prosecutors by other state officials concerned about losing the arbitration case.

"It's real curious, because in our past discussions with various people, including (District Attorney) Gene Cyrus, it looked like they were not going to file charges because they were not going to be able to prove anything," he said. "They indicated in mid-April that they had finished the investigation and decided not to file charges."

Watts also said some of the charges — the swimming pool and tape incidents — are new and were never brought up during the initial dismissals and subsequent hearings.

"If, in fact, something like that had occurred, I would think it would have been brought up," he said.

The union subpoenaed all reports of incidents involving residents during the time period of the allegations, Watts said. He said he doesn't remember seeing anything approaching the seriousness of the charges.

"We asked for signed statements, and they didn't provide them, and we asked them to bring people forward (who had witnessed abuses) and they did not," Watts said.

The union would not have appealed the dismissals if officials believed the accusations were true, he said.

Each charge of fourth-degree assault and reckless endangerment is punishable by up to one year in prison and a \$5,000 fine. Each harassment charge is punishable by up to 90 days in jail and a \$1,000 fine, said Cyrus.

Steve Stone is charged with three counts of harassment and two counts of reckless endangerment against two residents. One harassment charge is based on statements from three employees at Harborview who said Stone used masking tape to

immobilize a non-ambulatory resident subject to seizures.

Another employee described an incident in early 1983, in which Steve Stone allegedly pulled two residents from their wheelchairs and pushed them into a therapy pool, pulling them out on after they had gone under water.

"Neither one of them could have brought himself to the surface independently or could float by himself without a life jacket," the officer's statement said.

Collins is charged with counts of both fourth-degree assault and harassment against six residents.

He is accused of hitting two residents in the head and chest with a basketball, and kicking residents in the legs, buttocks, chest and stomach.

Jeffrey Stone faces six fourth-degree assault and six harassment charges against six patients. Four employees quoted by the officer said Stone hit three residents in the head with a basketball and kicked three others.